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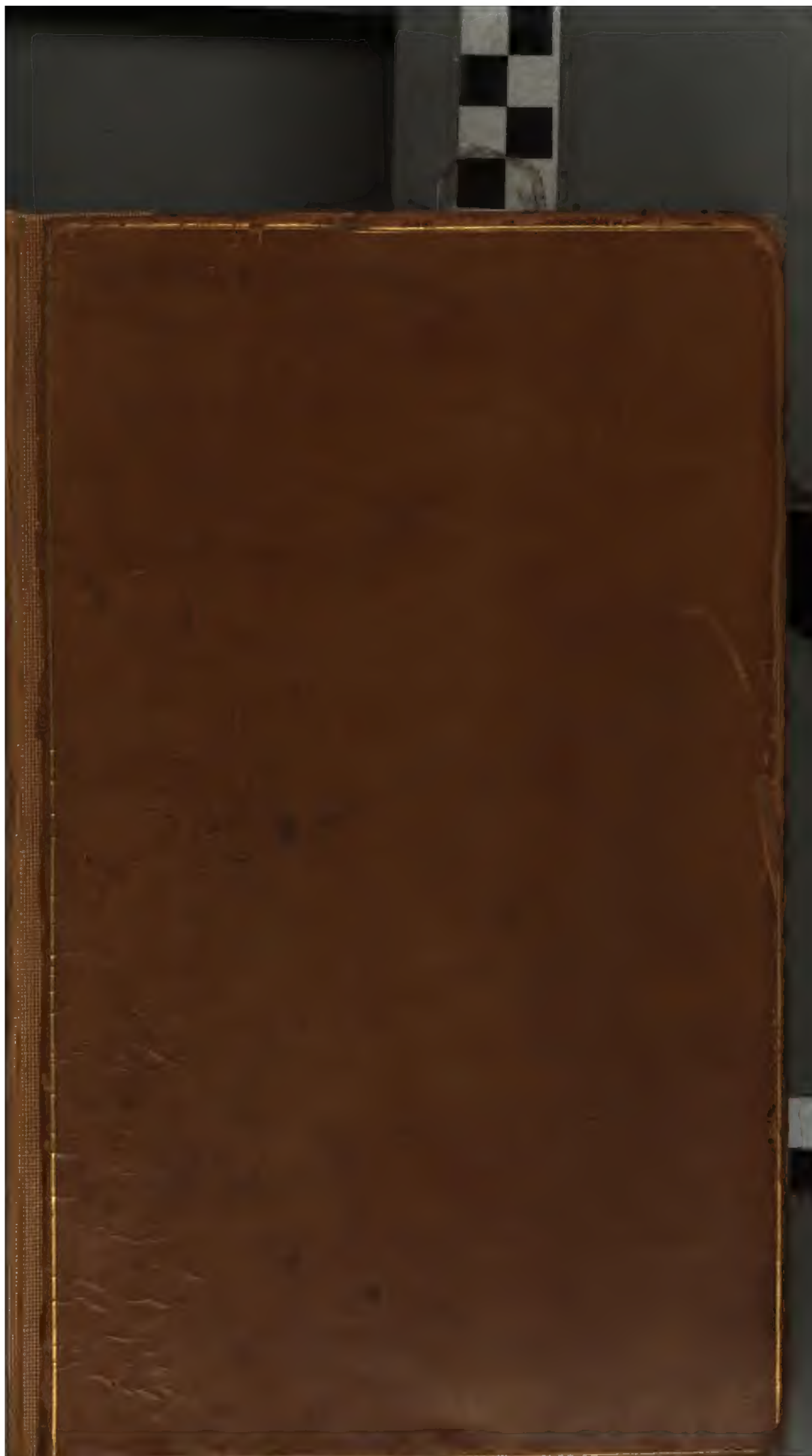
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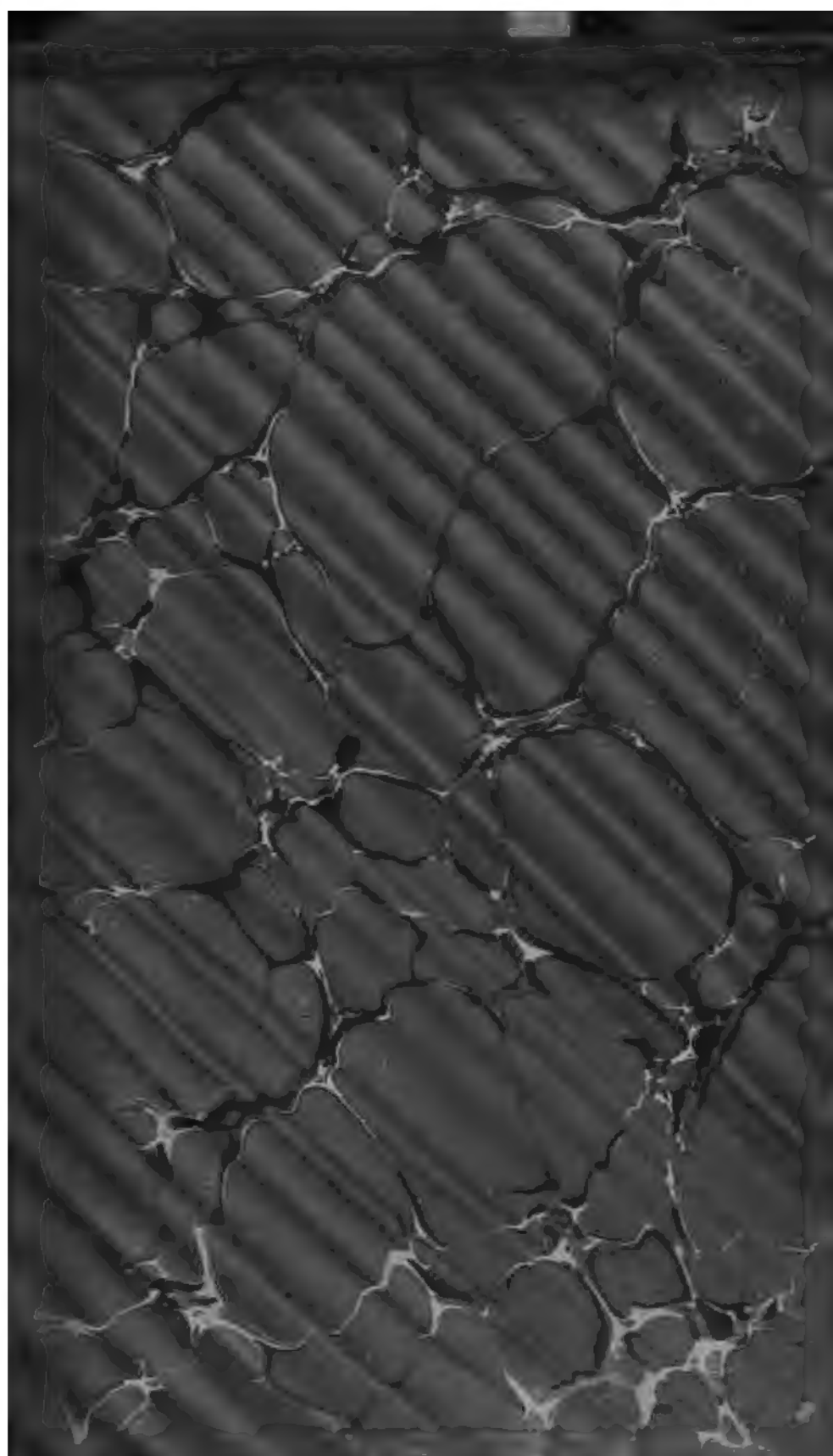
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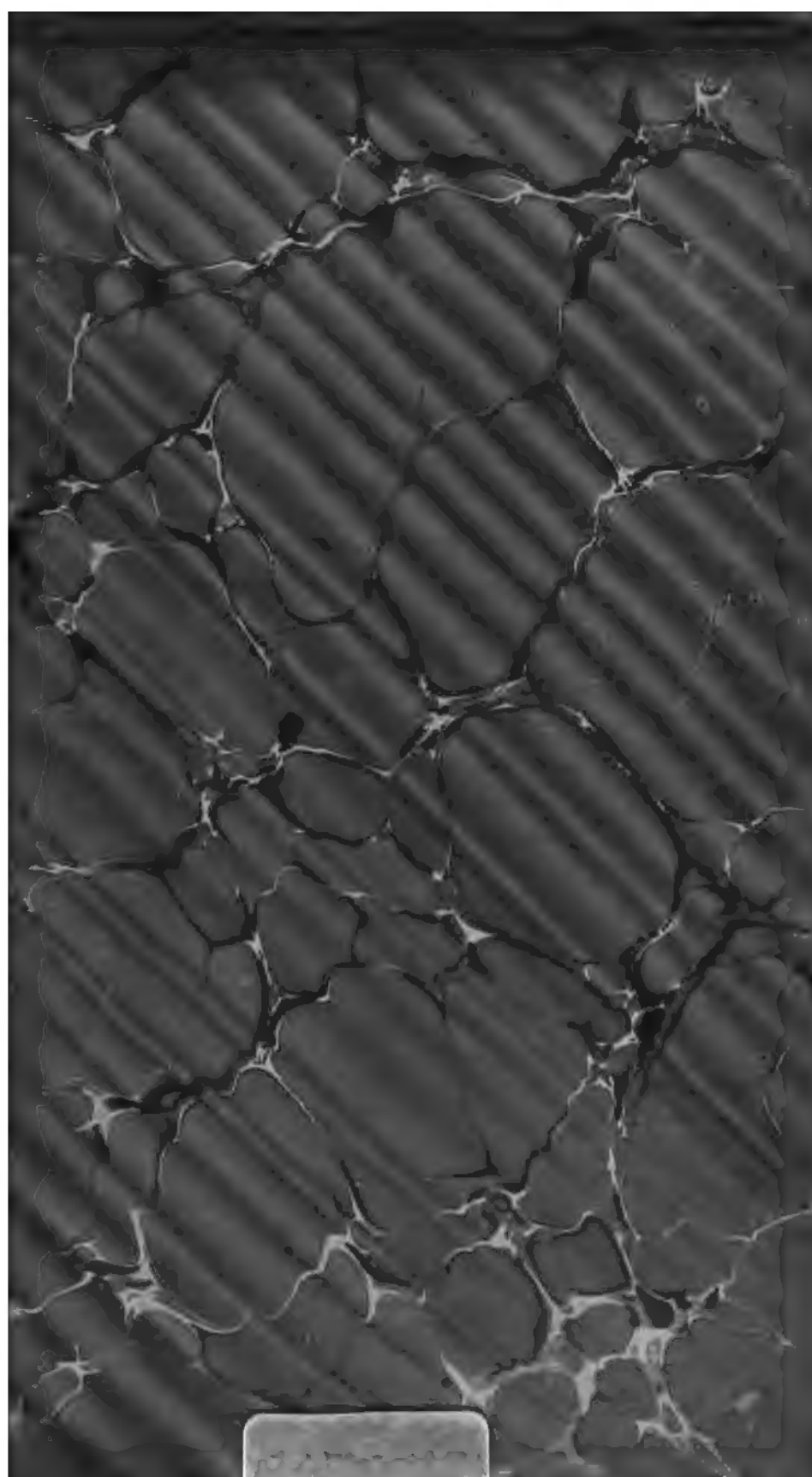
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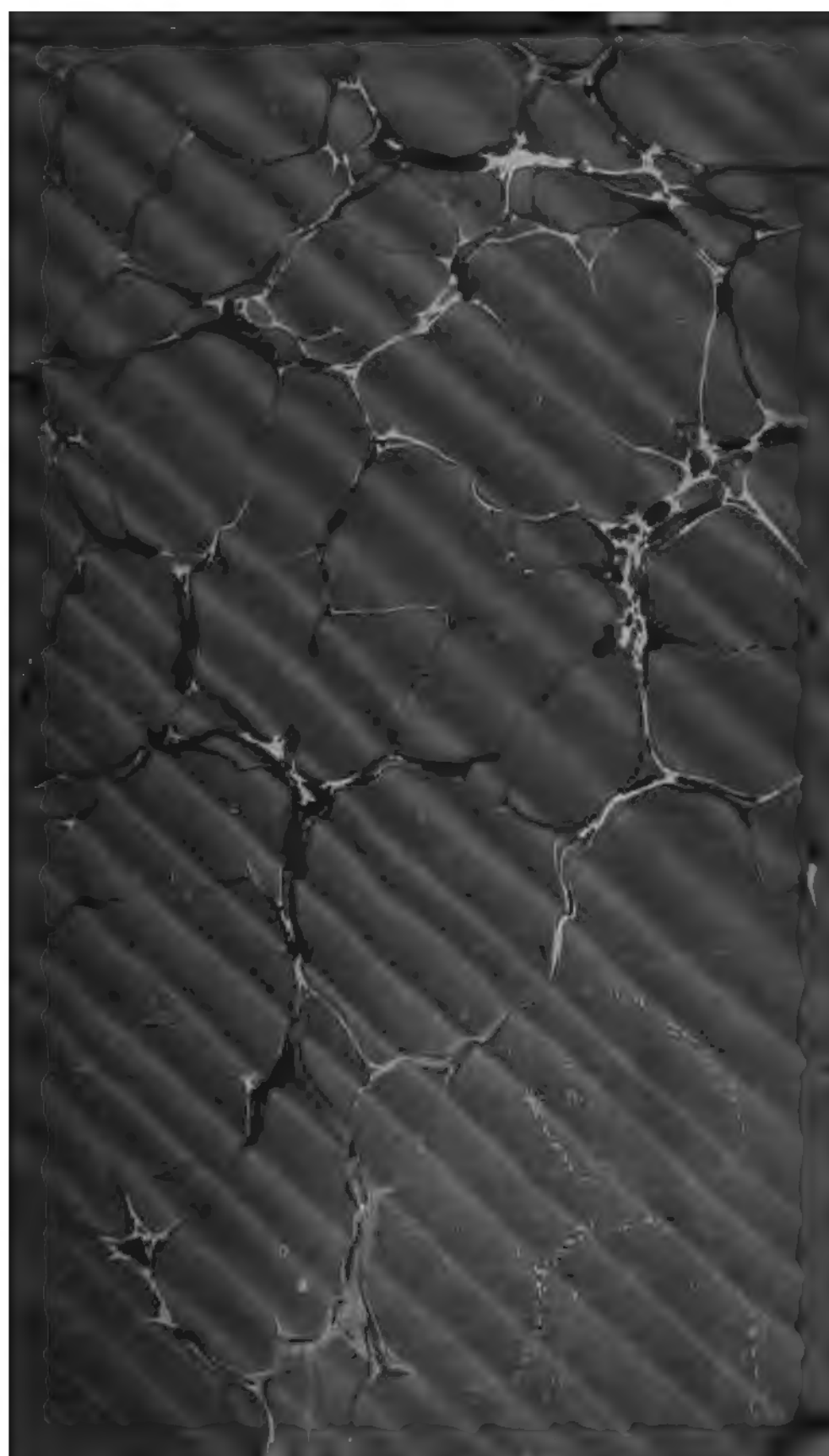
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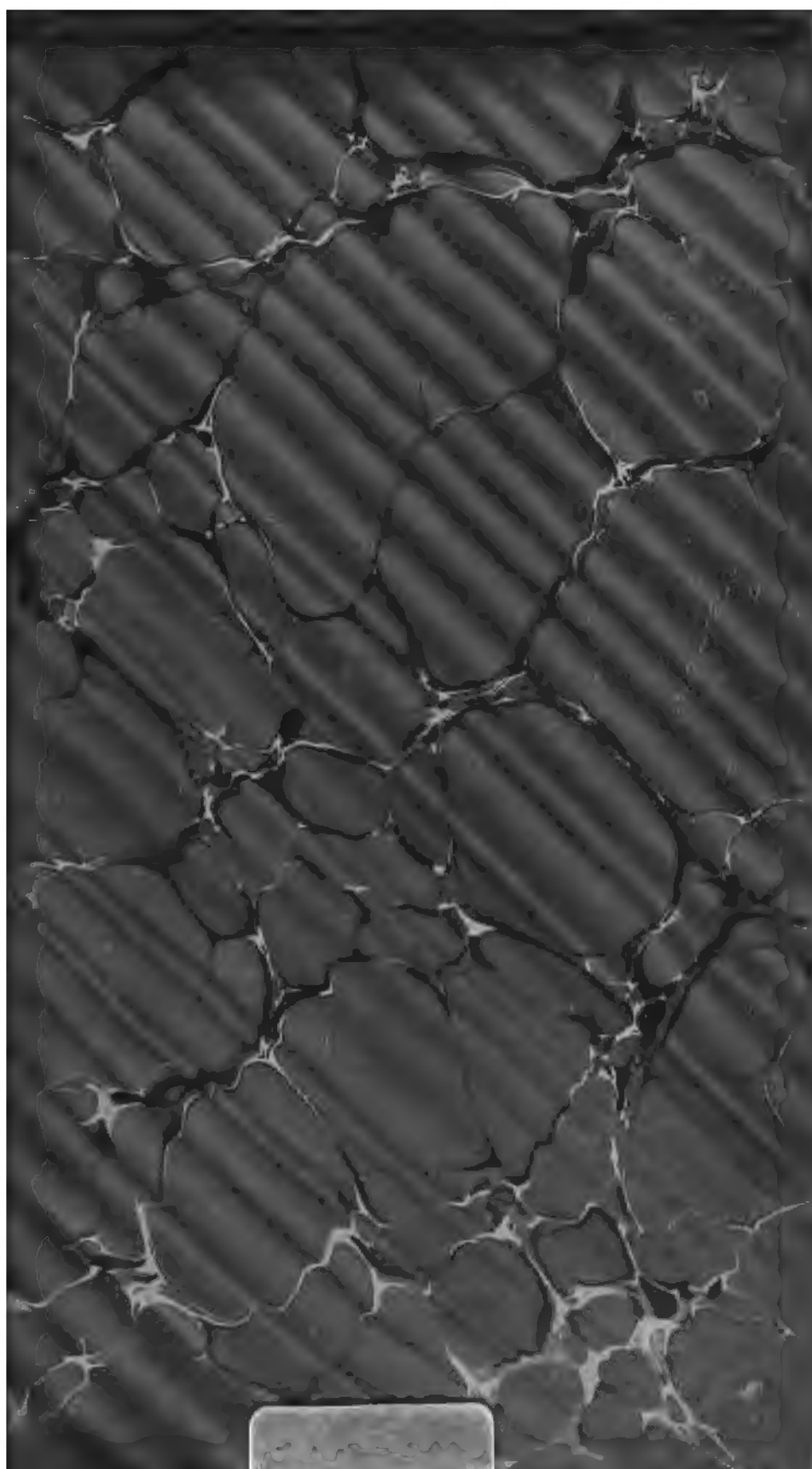


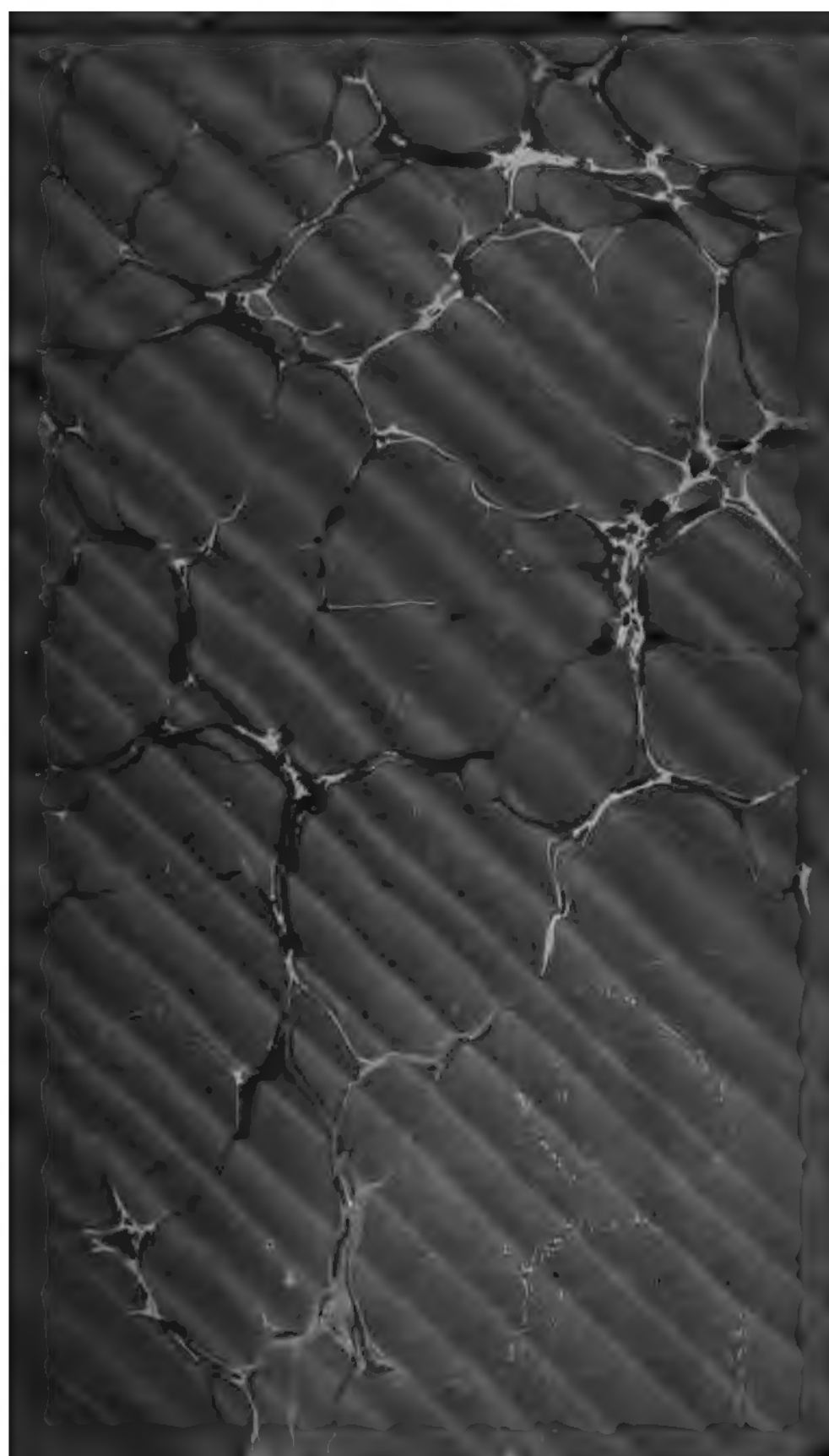












for

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Mr.

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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Court of Common Pleas,
AND
OTHER COURTS,
With Tables of the Cases and Principal Matters.

By PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. V.
FROM MICHAELMAS TERM, 8 GEO. IV. 1827, TO
EASTER TERM, 10 GEO. IV. 1829,
BOTH INCLUSIVE.

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1829.



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OF THE
COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

The Right Hon. Sir WILLIAM DRAPER BEST, Knt.
Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir STEPHEN GASELEE, Knt.

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1828.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

In the Ninth Year of the Reign of GEORGE IV.

CALVERT v. TOMLIN.

June 6.

THE Defendant, on the 8th of *February*, in *Hilary* term last, gave a *cognovit* for 50*l.*, with a condition “that no judgment should be entered up or execution issue, unless default were made in payment the 1st of *April* next.”

On *February* 16th he died. The Plaintiff on the 10th of *April*, in *Hilary* vacation, entered up judgment, and issued a *fi. fa.* tested in *Hilary* term, of a day anterior to Defendant’s death.

the ensuing 1st of *April*, and the Defendant died in *Hilary* vacation, before the 1st of *April*, judgment entered up on the 10th *April* in *Hilary* vacation, after Defendant’s death, was held regular, as relating to the first day of *Hilary* term, as also execution tested of a day in that term anterior to the Defendant’s death.

Where a *cognovit* was given on the 8th of *February* in *Hilary* term, with a condition that judgment should not be entered, unless default should be made in payment on

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Wilde Serjt. obtained a rule *nisi* to set aside this judgment and execution, as having been entered up and issued after the death of the Defendant.

Cross Serjt. shewed cause. The judgment has relation to the first day of *Hilary* term, which was anterior to the Defendant's death; and the writ being also tested of a day anterior to his death, the proceedings are regular. A *cognovit* is a mere acknowledgment of a debt, which authorizes the Plaintiff to sign judgment at any time, and is different from a warrant of attorney: *Wyborne v. Ross.* (a) In *Bragner v. Langmead* (b), it was laid down that a judgment signed in any part of the term, or the subsequent vacation, relates back to the first day of the term, notwithstanding the death of the Defendant before judgment actually signed; and that an execution against the goods of the Defendant may be taken out upon it, tested the first day of the term. And in *Waghorne v. Langmead* (c), it was holden that if a *fi. fa.* were *tested* before Defendant's death, but delivered to the sheriff and executed after, the execution was regular.

Wilde. That was a case in which a verdict had been taken, and the statute expressly provides for entering up judgment in case of death after verdict; but there is no case which sanctions the entering up judgment as of a day prior to the day on which the Plaintiff's right to judgment accrues: here, by express agreement, judgment was not to be entered up unless default were made in payment on the 1st of *April*; the party, therefore, had no right to judgment till that day. A judgment upon a *cognovit* is subject to the same rules as a judgment upon a warrant of attorney; and it is said

(a) 2 *Taunt.* 68. (b) 7 *T.R.* 20. 24. (c) 1 *B. & P.* 571.

in the books of practice, "If the first day of the term of which the judgment is signed, and to which the judgment has relation, be previous to the time stipulated in the defeasance &c. for the entry of the judgment, although judgment were not actually signed till afterwards, the Court would probably set aside the judgment." (a) In applying to sign judgment on an old warrant of attorney, it is always stated that the party was alive on a day in term prior to the application; and if it appears that he is dead, the Court will not allow judgment to be signed. In the present case, if the Defendant had been alive, the Plaintiff could not have signed judgment in *Hilary* term, and the death of the Defendant cannot put him in a better situation. Such a judgment by relation would interfere with the rights of other parties, — as, of executors, — which accrued on the death of the Defendant; and it was to prevent such consequences that the statute has required the day of signing judgment to be entered in the margin of the roll.

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BEST C.J. As the law stands at present, a *cognovit* is revoked by the death of the party, although it is difficult to find a satisfactory reason for this, since the party has nothing more to do after giving the *cognovit*, which distinguishes it from the case of a submission to an award. The Courts, however, have allowed a fiction to prevail for the furtherance of justice, and in *Bragner v. Langmead*, it was decided, that a judgment signed in any part of the term or subsequent vacation, relates back to the first day of the term, notwithstanding the death of the Defendant before judgment actually signed; and that an execution against the goods of the Defendant might be taken out upon it, tested the first day of the term.

(a) 2 *Archb. Pr. K. B.* 23.

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So in *Waghorne v. Langmead*, it was holden, that if a *fi. fa.* were tested before Defendant's death, but delivered to the sheriff and executed after, the execution was regular.

These cases are direct authorities in support of the present judgment, unless there be any thing in the circumstance, that if the party had been alive, the money could not, according to the agreement, have been levied during that portion of the term which elapsed previously to his death. The learned writer who makes the distinction, does not cite any case, and it does not appear in the decisions I have mentioned, whether the judgment could have been entered up before the death of the party or not. In the present instance, the money was not levied in fact till after the period at which, according to the agreement, it was to be paid; and if a judgment entered up at that time will relate to a period prior to the death of the party, we have all that justice and forms require. The proceedings have been regular, and the rule must be discharged.

PARK J. I am of the same opinion. The cases which have been cited are decisive of the point. The teste of the writ corresponded with the judgment in being anterior to the death of the party, and the judgment, though not entered up till the money was payable, having relation to the first day of term, the proceedings must be esteemed regular, according to the case of *Bragner v. Langmead*.

BURROUGH J. The debt was ascertained in the lifetime of the party, and time was given to pay it till *April 1st*. The intent of the parties was, that, at all events, judgment should be entered up, although time was to be allowed for the payment of the debt. The judgment when entered up, has relation to a time when
 the

the Defendant was living, and the proceedings are, therefore, regular.

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GASELEE J. I think the proceedings are regular. There is a distinction between a *cognovit* and a warrant of attorney. When judgment is entered up on a warrant of attorney, it must be shewn that the party is living, because if the Court know him to be dead, they will not allow judgment to be signed. But where there is already a confession of the debt on record, the Plaintiff does not want the authority of the Court to enter up judgment, which follows as of course upon the *cognovit*.

Rule discharged.

JOHNSON v. GILLET.

June 7.

WILDE Serjt. moved for a rule *nisi*, to compel the Defendant to enrol the proceedings under a commission of bankrupt, pursuant to 6 G. 4. c. 16. ss. 95, 96. by which it is enacted, "That all things done pursuant to the act passed in the fifth year of king George the Second, and hereby repealed, whereby it was enacted, that the Lord Chancellor should appoint a place where all matters relating to commissions of bankruptcy should be entered of record, and should appoint a person to have the custody thereof, be hereby confirmed; and the Lord Chancellor shall be at liberty from time to time, by writing under his hand, to appoint a proper person, who shall by himself or his deputy, (to be approved by the said Lord Chancellor,) enter of record all matters relating to commissions, and have the custody of the

The Court of C. P. has not authority under the 6 G. 4. c. 16. s. 96. to compel parties to enrol the proceedings under a commission of bankrupt. The application must be made to the Court of Chancery.

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entering thereof;" and "that in all commissions issued after this act shall have taken effect, no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of the personal estate of the bankrupt, or certificate of conformity, shall be received as evidence in any court of law or equity, unless the same shall have been first so entered of record as aforesaid." But

The Court were clearly of opinion that the application ought to be made to the Court of Chancery, and that this Court had no authority under the section.

Rule refused.

June 7.

LAWRENCE v. HOOKER.

In an action between *A.* and *B.*, the Court refused a rule to compel *B.* to produce, for the purpose of stamping, an agreement between *B.* and *C.*, although by an affidavit of *C.*'s it appeared that the act complained of by *A.* arose out of this agreement.

TROVER for a horse and harness.

Wilde Serjt. moved for a rule, calling on the Defendant to shew cause why the *venue* in this action should not be changed; and why an agreement entered into with the Defendant by one *Jee*, and in the hands of the Defendant, should not be produced to the commissioners of stamps to be stamped.

The motion was made on affidavit by *Jee*, that by the agreement in question he had upon certain conditions authorized the Defendant to remain in possession of certain articles distrained by the Defendant for rent due from *Jee* to the Defendant, (and among them the Plaintiff's horse and harness,) for a longer time than that allowed by law for the detention of distresses: and that the Plaintiff's horse and harness had by this means been sold

sold under the distress, instead of *Jee's* household furniture, which would have sufficed to discharge the rent.

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Wilde distinguished the case from those in which the Court had refused to compel parties in possession of instruments, to produce them for the purpose of being inspected or copied; and urged the hardship of a Plaintiff's case resting on the proof of an agreement, on the production of which he would be nonsuited for want of a stamp, which the Defendant had purposely omitted to supply.

The Court, however, thought it would be dangerous to interfere thus with the rights or liabilities of third persons; and putting the case of a party who might innocently have entered into an illegal agreement, and have abandoned it upon discovering its illegality,

Refused the rule as to the production of the agreement.

REVETT v. BROWN.

June 7.

TRESPASS for breaking and entering a chapel. The Defendant justified the trespass under *Hudson*, who was alleged to be the owner of the freehold.

At the trial before *Garrow B. Suffolk* Summer assizes 1827, it appeared that Plaintiff had built the chapel, but afterwards being in embarrassed circumstances, he conveyed all his property, including the chapel, as it was alleged, to *Hudson*, in trust for the pay-

The Plaintiff, who had built a chapel, conveyed it to Defendant by a deed the validity of which was questionable. Defendant took possession, and gave

the key to a gardener, who, with his permission, lent it to the Plaintiff to preach in the chapel. The Plaintiff thereupon locked the chapel, and refused to re-deliver the key: Held, that he had not sufficient possession to maintain trespass.

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ment of Plaintiff's creditors. The deed was executed with a blank, for a sum alleged to be due to one *Mills*, which blank was afterwards filled up with the sum of 14,858*l.* as a balance due to *Mills*, the recital of the deed stating that a balance had been adjusted between him and the Plaintiff.

Hudson, who was put into possession under this deed, left the chapel in the care of a gardener, to whom he delivered the key, with permission to allow the Plaintiff to preach in the chapel.

The Plaintiff, who had been accustomed to preach in the chapel, borrowed the key of the gardener for that purpose, and then having locked the chapel up, refused to re-deliver the key, whereupon the Defendant, by *Hudson*'s orders, broke the chapel open. The gardener had been accustomed to lend the key to preachers of various persuasions, who frequently preached in succession, on the same day.

The validity of the deed was much disputed at the trial; but without giving any opinion on that point, the learned Baron left it to the jury to say whether the Plaintiff was sufficiently in possession of the premises to maintain trespass against a wrong-doer. Subject to this question, which was also reserved for the Court, a verdict was found for the Plaintiff; which

Storks Serjt. moved to set aside and enter a nonsuit instead, on the ground that the possession of the premises, if not the complete title, was in *Hudson*.

Wilde Serjt. shewed cause, and argued that the deed to *Hudson* was void by reason of the filling up the blank after execution, and that, therefore, *Hudson* took nothing under it. No opinion, however, was given on this point; the decision of the Court turning altogether on the question,

tion, Whether the Plaintiff had a sufficient possession to maintain trespass.

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v.

BROWN.

BEST C. J. The Plaintiff had not such a possession as would entitle him to sue in trespass. Possession alone is indeed sufficient for that purpose, as against a wrong-doer; but then it must be a clear and exclusive possession. Now the gardener had the key of the chapel, not from the Plaintiff, but from *Hudson*, and he delivered it to the Plaintiff, not as a symbol of possession, but merely for the purpose of preaching. If that were sufficient, any person who preaches in a chapel might maintain trespass against the owner. This rule must be made absolute.

PARK J. If the Plaintiff had enjoyed the constant and exclusive use of the chapel, the case might have been different; but the key was delivered to the gardener with permission to allow the Defendant to preach, and many others preached there also. This was not sufficient evidence of possession to go to the jury.

The rest of the Court concurred, and the rule was made

Absolute.

1828.

June 9.

WOOD v. NUNN.

A landlord, to whom rent was in arrear, hearing his tenant and a stranger disputing about the property of an article on the premises, early in the morning entered and said, "The article shall not be removed till my rent is paid." The stranger, nevertheless, removed the article. On the same day, after the removal, the landlord sent his broker to distrain for the rent:


Held, that the distress was sufficiently commenced by the landlord to entitle him to the article in question.

TROVER for a lathe. At the last *Cambridge* Summer assizes, before *Alexander* C. B., it appeared, that the lathe in question was in the house of one *Saunders*, who owed the Defendant two years' rent.

One morning, between six and seven o'clock, the Defendant hearing that the Plaintiff was about to remove the lathe, entered *Saunders's* house, where he found the Plaintiff and *Saunders*, who had formerly been partners, disputing about the property in the lathe, the Plaintiff endeavouring to remove it as his own, under an award, and *Saunders* averring that he would die by the lathe rather than suffer it to be removed; upon which, the Defendant, laying hands on the machine, said, — "I will not suffer this or any of the things to go off the premises till my rent is paid." The Plaintiff, nevertheless, succeeded in carrying the lathe off the premises; but the Defendant, about twelve o'clock the same day, made a formal distress, by his bailiff, of the goods in *Saunders's* shop, and caused the lathe to be retaken and brought back to the shop.

On the part of the Plaintiff it was urged, that there had been no distress till the Defendant sent his bailiff, and the lathe, having been carried away before that time without fraud, on a *bonâ fide* assertion of property, the Defendant had no right to retake it. The learned Chief Baron thought the distress was sufficiently made by what fell from the Defendant upon his entering *Saunders's* house early in the morning, and said it would be a strange state of law if a landlord, finding the goods on the premises in peril of being removed, could not commence

mence a distress at once, and complete the formal part of the proceeding afterwards. A verdict having been found for the Defendant,

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Wilde Serjt. obtained a rule *nisi* for a new trial, which the Court, without hearing the other side, now called on him to support. He urged, that the lathe belonging to the Plaintiff, and having been detained on the premises by the wrongful resistance of the tenant, the landlord had no right to seize it. If he were allowed to do so, a landlord and tenant might always collude, to satisfy rent with the property of a stranger.

But the lathe was removed *bonâ fide* before the distress took place; for the Defendant, by sending his broker or bailiff at twelve, shewed clearly, that in his view of the affair, no distress had been made in the morning.

BEST C.J. There was no collusion here between landlord and tenant, for *Saunders* claimed the lathe for himself, and not for his landlord; nor is it true that the lathe was removed before the distress commenced. The distress commenced when the landlord came on the premises, and said — “This shall not go till my rent is paid.” From that time the property was in the custody of the law, and being improperly removed, the landlord had a right to get it back. The verdict for the Defendant must stand.

PARK J. There was no collusion between the landlord and tenant, and there is no ground for making the rule absolute.

BURROUGH J. The distress commenced when the landlord came on the premises; and as he was not privy
to

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to the transactions between the Plaintiff and *Saunders*, the rule must be discharged.

GASELEE J. The lathe was on the premises in the morning when the landlord came, and he was entitled to distrain it. There is no necessity for entering into the supposed case of a tenant bringing property on the premises for the purpose of its being distrained. No such fact appears in the present case, and the rule must be
Discharged.

June 9.

WHALE v. LENNY and Others, Assignees.

In an action against the assignees of a bankrupt, the Court refused to permit Defendants to plead *non est factum*, and that the premises did not come to them by assignment.

COVENANT against the Defendants, as assignees of a bankrupt. Profert excused, on the ground that the deed was in the possession of the Defendants.

Jones Serjt. moved to plead several matters, viz. first, *non est factum*; second, that the deed was not in the possession of the Defendants; third, that the premises did not come to the Defendants by assignment; fourth, performance.

The Court refused to allow *non est factum*, and that the premises did not come to the Defendants by assignment, to stand together, and put *Jones* to his election when he abandoned the *non est factum*.

Upon a former day the Court gave out, in a case which was not pressed to a decision, that where a title was deduced through a number of successive links, they would

would only allow the Defendant to traverse the material allegation, and not to take issue on every distinct averment of fact immaterial to the decision of the cause. — See *Gully v. Bishop of Exeter*, *post*. p. 42.

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FIELD and Others v. CARR.

June 9.

THIS was an action on two bills of exchange drawn by *Thomas Crawshaw*, payable at four months after date, on the Defendant, and accepted by him. They became due *February 22. 1823*, and amounted together to *132*l.* 4*d.**, the price of certain wool which Defendant had bought of *Crawshaw*. These bills *Crawshaw* indorsed to the Plaintiffs, his bankers, who before they became due, entered the amount of them to his credit as cash. When due they were dishonoured; upon which the Plaintiffs entered to *Crawshaw's* debit an equal sum, as for bills returned.

In *April 1823*, a few days after the bills were due, Defendant paid the amount of them to *Crawshaw*, but neglected to require him to deliver up the bills.

Crawshaw continued his banking account with the Plaintiffs, and by the 13th of *January 1824* had paid in to his own credit a sufficient sum to cover all the items placed to his debit up to that date, including the amount of the above bills. There was no specific appropriation of these payments to any particular debit; but the balance against him upon a settlement of ac-

Defendant accepted a bill of exchange drawn by C., who indorsed it to his bankers; they entered it on the credit side of C.'s account, but the bill having been dishonoured, entered it afterwards on the debit side. A few days after the dishonour, Defendant paid to C. the amount of the bill, but omitted to take it out of the banker's hands.

C. subsequently paid in to the

banker on his general account more than enough to cover all the items of the account preceding the bill item, and that item also, and the bankers, for a space of three years, treated the bill as paid; they then sued Defendant on his acceptance:

Held, that he was not liable.

counts

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counts at the end of the year 1823, was 526*l.* 9*s.*; at the end of 1824, 1061*l.* 9*s.*; and at the end of 1825, 426*l.* 2*s.* 10*d.* The balances were duly struck, and no demand was made in respect of these bills. In *April* 1826 *Crawshaw* became bankrupt; the Plaintiffs proved their full demand against him under the commission, and deposed that they had received no security or satisfaction whatever, save and except certain bills of exchange referred to in the deposition, and which were not the bills in question. From the time the bills became due, to the commencement of this action, in 1827, no demand was ever made by the Plaintiffs on the Defendant in respect of the bills.

Upon the trial before *Bayley J.*, *York* Summer assizes 1827, a verdict was found for the Plaintiffs. Whereupon

Jones Serjt. obtained a rule *nisi* to set it aside upon affidavits disclosing the state of the accounts between *Crawshaw* and the Plaintiffs, and some other matters in respect of which the Defendants had been surprised at the trial.

Spankie Serjt., who shewed cause against the rule, argued that the Plaintiffs always held these bills as an additional security; that the acceptor could not be discharged except by payment to the holder; and that, therefore, the Plaintiffs' claim did not fall within the rule in *Clayton's* case. (a) If any of the money paid in by *Crawshaw* had been paid in respect of these bills *nominatim*, they would have been given up; and if none was paid in respect of them *nominatim*, although payments on account would extinguish general items of account in order of priority, they would not extinguish distinct outstanding securities.

Jones. The Plaintiffs' claim falls precisely within the

(a) 1 *Mer.* 572.

rule in *Clayton's* case; for though the Defendant inadvertently omitted to demand his acceptances of *Crawshaw* when he discharged them, yet the amount of the bills formed one item in the general account between the Plaintiffs and *Crawshaw*, and therefore was extinguished in order of priority by the sums paid in. *Bodenham v. Purchas* (a), and *Simson v. Ingham* (b), are in point.

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The conduct of the Plaintiffs is an admission that they considered it so extinguished, for balances were struck for three years successively without any demand in respect of the bills, and they were never mentioned when the Plaintiffs proved their debts against *Crawshaw* upon his bankruptcy.

BEST C. J. Upon the principle established in *Clayton's* case, and recognized in *Bodenham v. Purchas*, and *Simson v. Ingham*, the Defendant is entitled to have this rule made absolute. The action is brought on two bills of exchange drawn by *Thomas Crawshaw* on the Defendant, at four months' date, and accepted by him. They were given for the price of certain wool purchased by the Defendant of *Crawshaw*, and indorsed by *Crawshaw* to the Plaintiffs, his bankers. In *April* 1823, shortly after the bills became due, the Defendant paid the amount of them to *Crawshaw*, but neglected to require him to deliver up the bills. That payment alone would not have discharged the Defendant, the Plaintiffs having been at that time the holders, and entitled to the amount of the bills. But the ground on which the Defendant is entitled to have this rule made absolute is, that the Plaintiffs not only entered the bills to the debit of *Crawshaw*, but treated them as having been paid; and if so, according to the rule in *Clayton's* case, the Defendant is discharged. There is indeed an exception to that rule, but the exception does not apply here.

(a) 2 B. & A. 39.

(b) 2 B. & C. 65.

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Bayley J. says (a), "The principle is this, that where there are distinct accounts, and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases; but where the accounts are treated as one entire account by all parties, that rule does not apply."—"It certainly seems most consistent with reason, that where payments are made upon one entire account, such payments should be considered in discharge of the earlier items." The Master of the Rolls says, "In such a case," (that is, a banking account,) "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other."

Neither the Master of the Rolls nor *Bayley J.* say that such act is conclusive. It is undoubtedly open to the party to shew a payment on account of the particular bill, but in the absence of proof of any such application of the sums paid in, the first payments must be applied to the discharge of the first debts. In the present instance, although there was always a balance against *Crawshaw*, yet enough had long since been paid in to discharge all the items of the account preceding the bills, and the bills also. And the Defendant's case is stronger than those which have preceded it, because in 1823, 1824, and 1825, the Plaintiffs treated these bills as paid. In 1826, when *Crawshaw* became bankrupt, nothing was said about the bills, and it was not till 1827 that the Plaintiffs thought of calling on the De-

(a) 2 B. & A. 45.

fendant.

fendant. Under these circumstances, it would be in consistent with every principle of law and honesty that the Plaintiffs should recover. The rule settled by Sir *W. Grant* has received the sanction of every court in *Westminster Hall*.

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PARK J. The rule in *Clayton's* case has been adopted by all the courts in *Westminster Hall*, and the only question is, whether the facts here come within it? I am of opinion that they do; and that the case is pregnant with circumstances in favour of the Defendant.

GASELEE J. (a) The question is, whether, under all the circumstances, the Plaintiffs' claim has been destroyed? I think it has by their own conduct; and in that view it is not material whether they have been paid by *Carr* or not. By the course of their accounts it is admitted that they have been paid by *Crawshaw*.

Rule absolute.

(a) *Burrough J.* was at Chambers.

Archbishop of TUAM v. ROBESON and Another.

June 10.

LIBEL. The declaration stated that the Plaintiff, at the time of publication, was, and still is, Archbishop of *Tuam*:

That at the time of publication one *Thomas Maguire* acted as a priest of the Roman Catholic church in *Ireland*:

That the Plaintiff had acted honourably as archbishop:

That the Plaintiff never promised nor offered to *Maguire*, nor to any person, any sum of money as an inducement for him to cease to act as a priest of the Roman Catholic church, or to accede to become a Protestant clergyman; nor a living of 800*l.* a year, nor any living

It is a libel to publish of a protestant archbishop, that he attempts to convert Catholic priests by offers of money and preferment.

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for such a purpose; nor did he ever offer any living, but in the due discharge of his duty as archbishop:

Yet the Defendants well knowing the premises, but contriving, and maliciously intending wrongfully to injure the Plaintiff in his good name, fame, credit, and reputation, and in the respect and good opinion which he had obtained, and to bring him into public scandal and disgrace, and to cause it to be believed that the Plaintiff had misconducted himself as such archbishop as aforesaid, and had promised to the said *Thomas Maguire* a large sum of money and a living of 800*l.* a year, and that the Plaintiff had written to a Protestant clergyman to make such offer, in order to induce the said *Thomas Maguire* to accede to become a Protestant clergyman, did, on the 8th of *November* 1827, at *Westminster*, &c. falsely, wickedly, and maliciously, print and publish, and cause and procure to be printed and published, in a certain newspaper called *The Morning Herald*, a certain false, scandalous, and malicious libel, of and concerning the Plaintiff, and of and concerning the conduct of the Plaintiff as archbishop, and of and concerning the Plaintiff's supposed offer to the said *Thomas Maguire* as aforesaid, containing therein the false, scandalous, malicious, and libellous matter following, of and concerning the Plaintiff, and of and concerning the conduct of the Plaintiff as such archbishop as aforesaid, and of and concerning the Plaintiff's supposed offer to the said *Thomas Maguire* as aforesaid; that is to say,

“ *Ireland: Dublin, November 5th.* The speech of the Rev. Mr. *Maguire* (a) at the *Roscommon* Catholic meeting, has excited a prodigious sensation. The second reformation did not need this last shock to destroy it, but now that it has come, a vestige of the fabric does not remain. Who do you think was the

(a) The *innuendoes* of identity are omitted to avoid prolixity.

archbishop who promised *Maguire*, the priest of the mountains, 1000*l.* in cash, and a living of 800*l.* a year? Why, no less a personage than the Archbishop of *Tuam*!!! This statement I received this day from Mr. *M.* himself. The *Archbishop* wrote to a Protestant clergyman desiring him to make the offer, and to shew the letter; but not to surrender it into his possession, unless *Maguire* was disposed to accede, and the induction into the living was to take place within eight days! All these facts are capable of proof, and will be proved, if their authenticity is denied. A writ has been served on him by a country innkeeper, at whose house he resided for about three months, three years since (when he first took possession of his miserable parish), for the seduction of his daughter. As a proof of the fairness of the saints, it may be observed, that with the 5000 copies of the published report of the discussion between *Pope* and *Maguire*, which they printed, they have bound up Dr. *Otway's* *Strictures on the Arguments*!!! The Report, it was understood, should go out on its own merits:”

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Meaning, by the said libel, that the Plaintiff had offered the said *Thomas Maguire* 1000*l.* in cash and a living of 800*l.* a year, if the said *Thomas Maguire* would accede to become a Protestant clergyman.

There were other counts, but the innuendo was the same in all; and though the introductory statements differed, none of them stated any matter of fact as explanatory of the libel, except that the Plaintiff was Archbishop of *Tuam*, and that *Maguire* had acted as a Roman Catholic priest.

The Defendants pleaded the general issue; and a verdict with 50*l.* damages having been obtained for the Plaintiff,

Taddy Serjt. moved to set it aside and enter a non-suit, or arrest the judgment.

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There is no introductory statement to shew what is meant by “the *Roscommon* meeting,” “the second reformation,” or the “living of 800*l.* a year,” which, for aught that appears to the contrary, might be a living which it might have been proper for the Plaintiff to bestow on *Maguire*. It is not averred, even, that he was a priest. An allegation of fact cannot be made in an innuendo: *Goldstein v. Foss.* (a) Such allegations as are necessary to explain the libel must be clearly made in the introductory statement, and then be referred to by innuendo: the general innuendo, therefore, at the end of the first count, will not assist the Plaintiff, and for want of a substantive explanatory statement the alleged libel is without a meaning.

But supposing it otherwise, there is no imputation on the Plaintiff’s character in the conduct ascribed to him. To make converts, even by purchase, is a praiseworthy effort of religious zeal, sanctioned by act of parliament, and warranted by the practice of our own and other Christian establishments. There are numerous statutes by which sums of money are provided for converted Catholic priests; the last allows 40*l.* for each such priest till he shall have been provided for by the bishop of the diocese; and at *Rome* a Jew is paid annually by the Pope for making public profession of conversion.

A writing is no libel unless some crime be imputed, or unworthy motives, or something likely to exclude a party from society: *Lord Kerry v. Thorley.* (b) The imputation on the Plaintiff, if any, is only of extraordinary zeal.

BEST C. J. Probably the declaration might have been more accurately drawn; but after verdict, the question is, whether enough appears on the record to

(a) 4 *Bingb.* 489.

(b) 4 *Taunt.* 355.

sustain the action? It is not easy to perceive why any distinction should be made between written and oral slander; but the case referred to, *Lord Kerry v. Thorley*, has established it too firmly to be shaken. According to that case, in order to support an action for oral slander, something criminal must have been imputed; but in a libel any tendency to bring a party into contempt or ridicule is actionable, and, in general, any charge of immoral conduct, although in matters not punishable by law. Is then immoral conduct imputed to the Plaintiff by this libel? (After reading this libel his Lordship proceeded:) *Maguire* is represented as having said that the Plaintiff had offered him 1000*l.* and a living of 800*l.* a year if he would change his faith, and the whole statement concludes, “all these facts are capable of proof, and will be proved, if their authenticity be denied.” Among these facts is the disgraceful employment of a church of *England* clergyman to tamper with the conscience of a priest, and the misapplication of church of *England* preferment; for such we must take it to be, as the archbishop would have no other in his gift. Would it be immoral in the archbishop if he attempted to bribe a man to renounce his religion, and to endow such a proselyte with church of *England* preferment? Would it be immoral to employ, in making hypocrites, funds destined to the support of the Protestant church? If the seduced be guilty, it is impossible to say that the seducer is innocent. But it has been urged, that nothing immoral is imputed, since the legislature has held out to Catholic priests the same kind of temptation to become protestants. Even if that were so, it would not persuade me that such a course was moral. But the legislature has not done this; it has only said, that if a man be converted he shall not be left to starve in the midst of a hostile community. The legislature has provided a maintenance for him, not to per-

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suade him to become a convert, but to support him when converted: the sum allowed is too small to operate as a temptation to insincerity. We collect, therefore, from this record, that there is a charge reflecting on the moral conduct of the archbishop; a charge which, if true, ought to exclude him from the situation which he fills. But we have been referred to the case of *Goldstein v. Foss*, and have been told that the record is defective in introductory averments to support the various innuendoes. However, neither the facts nor the judgment in that case interfere with the present decision. There the declaration alleged, that whereas divers persons had been associated together under the name of "The Society of Guardians for the Protection of Trade against Swindlers and Sharpers," and the defendant, under pretence of being secretary of the society, had, from time to time, published printed reports for the purpose of announcing to the society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed as members of the society; and whereas the plaintiff was a merchant of good character; yet the defendant falsely and maliciously published of and concerning the plaintiff, in his trade and business, the following libel:—

"Society of Guardians for the Protection of Trade against Swindlers and Sharpers.—I, *E. F.*, am directed to inform you that the persons using the firm of *Goldstein* (meaning the plaintiff) are reported to the society as improper to be proposed to be ballotted for as members thereof;" thereby meaning that the plaintiff was a swindler and a sharper, and an improper person to be a member of the said society: and it was held that the innuendo could not be supported without a previous averment that it was the custom of the society to designate swindlers and sharpers by the terms, "*improper persons to be members of that society.*" The libel in that case was different from the present in this respect, that

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on the face of it there was no imputation of immoral conduct. There is quite enough in the language here to constitute this a libel after verdict.

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PARK J. I am of the same opinion. Sufficient is stated here to render this a libel on the Plaintiff. The paper charges an archbishop, not with endeavouring to extend the Protestant faith, but with having selected a person who was under a charge of seduction for the ministry of a Protestant church, and with offering to reward him, not for a sincere conversion, but for a colourable profession of conformity. That is the gist of the allegation, and that is a libel. An innuendo without previous explanation will not, it is true, make that a libel which is not otherwise libellous; but the imputation of immoral conduct is sufficiently clear on the present record.

BURROUGH J. If we are to understand the language of this attack as the rest of the world would do, there can be no doubt it is a gross and infamous libel. The Plaintiff is charged with having sought to induce an improper person to abandon his religious creed, not by reasoning, but by a gross bribe. The libel is such as not to need explanation, and the innuendoes are sufficient.

GASELEE J. The misconduct laid to the Plaintiff's charge is, the having offered to a Catholic priest 1000*l.* and a living of 800*l.* a year, to become a Protestant. It has been urged, that there is no preliminary allegation sufficient to warrant such an innuendo; but it is alleged that the Defendant, seeking to cause it to be believed that the Plaintiff, as archbishop, had promised *Maguire* 1000*l.* and a living of 800*l.* a year, and had written to a Protestant clergyman to make such offer to induce

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Maguire to become a Protestant, published of and concerning the conduct of the Plaintiff, and of and concerning the plaintiff's said supposed offer, the libel following. That is a sufficient allegation of the offer to which the libel refers; for in *Rex v. Horne (a)*, in an indictment for a libel on the king and his troops, it was held a sufficient allegation, that the libel was published of and concerning the king and his troops. The jury have found that this was published of and concerning the Plaintiff, and that gets rid of the objection to the frame of the declaration. As to the merits, this is equally a libel, whether it proposed to impute to the Plaintiff indiscretion or dishonesty; the manifest object of it was to bring him into disrepute. It charges him, also, with a consciousness of incorrect conduct, because it is alleged that he desired his letter not to be shewn.

Rule refused.

(a) *Cowp.* 672.

June 11.

PREECE v. CORRIE.

Avowant, who had a term which expired on the 11th of November 1826, let the premises orally from the 11th of September to the 11th of November in that year, for 270l., payable immediately:

TO a cognizance by the Defendant for rent-arrear from the Plaintiff, as tenant to *Thomas White*, under a demise for a certain term, to wit, from the 11th day of September 1826 till the 11th of November in the same year, the Plaintiff pleaded,

First, that he did not hold the premises, as tenant to *White*, by virtue of the said supposed demise;

Held, that this was a lease, of which parol evidence might be given, and not an assignment requiring a writing; but that being a demise of the whole of avowant's interest, he had no right to distrain.

Secondly,

Secondly, that by the said supposed demise, *White* demised and granted the premises to the Plaintiff, for all the residue and remainder of his, *White's*, estate, term, and interest in the same, and that he had not at the time when, &c., or at any time during the supposed demise to the Plaintiff, any reversionary estate, term, or interest in the premises, expectant, or to take effect, upon or after the expiration of the term granted to the Plaintiff by the supposed demise.

The Defendant took issue on the first plea, and to the second replied, that *White* did not demise and grant the premises to the Plaintiff, for all the residue and remainder of *White's* estate, term, and interest in the same; and on this issue was joined.

At the trial before *Littledale J. Hereford* Summer assizes, 1827, it appeared, that *White* had a term in the premises, which expired on the 11th of *November* 1826; and that on the 11th of *September* in that year, in the completion of some arrangements between him and the Plaintiff, he let the premises orally to the Plaintiff, to hold till the same 11th of *November*, paying 270*l.* rent immediately.

The jury found, first, that *White* demised to the Plaintiff; secondly, that *White* parted with the whole of his term. The latter finding negating in effect the Defendant's right to distrain, and so amounting to a verdict for the Plaintiff,

Russell Serjt. moved to set aside the verdict and have a new trial, or enter a verdict for the Defendant, on the ground that the Plaintiff's plea of *non tenuit* had been found in favour of the Defendant; and that no admissible evidence had been adduced in support of the second plea, which amounted in effect to an allegation, that *Thomas White* had assigned all his interest in the premises, and such an assignment could not, under the statute

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statute of frauds, be effected, except by writing. If the plea did not amount to an allegation of assignment, it must be taken to shew an under-lease from *White* to the Plaintiff; and in that case he would have been entitled to distrain.

A rule *nisi* was granted, against which *Ludlow* Serjt. was to have shewn cause; but the Court called on

Russell to support his rule. He cited *Bac. Abr. Assignment*, to shew that an averment in pleading that a person has parted with all his interest is equivalent to an averment of an assignment; and 2 *Inst.* 483., to shew that the word *demise* was not confined to a granting by lease, but might apply to any other transfer of property. But if *White* had made an assignment it was void for want of a writing, *Botting v. Martin* (a), and evidence of it was not admissible. If the transfer did not amount to an assignment it was an under-lease; for in *Poultney v. Holmes* (b), which had been recognized in *Smith v. Mapleback* (c), it was holden, that where a man parted with all his interest in a term, but reserved a rent, the transaction amounted to an under-lease. If so, the Defendant was entitled to distrain, and the second plea amounted indirectly to a plea of *nil habuit in tenementis*, which the law did not allow a lessee to plead against his lessor. *Alchorne v. Gomme.* (d)

BEST C. J. There is no pretence for the motion. This was an action of replevin, and the Defendant made cognizance as bailiff of *White*, alleging that the Plaintiff held as his tenant under a demise, from 11th *September* 1826 to 11th *November* in the same year, at a rent of 270*l.* To this there were two pleas: first, *non tenuit*; secondly,

(a) 1 *Campb.* 318.(b) 1 *Str.* 405.(c) 1 *T. R.* 445.(d) 2 *Bingb.* 54.

that

that *White*, by the demise mentioned in the cognizance, granted the premises for the whole of his estate in them, leaving no reversionary interest expectant on the determination of the term. Upon these pleas issue was joined. The jury found for the Defendant upon the *non tenuit*; but on the last plea they found that there was a demise of *White's* whole estate.

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Both findings are proper. At first sight it might appear, that, consistently with the second plea, *non tenuit* ought to have been found for the Plaintiff: but this demise, though not entitling the lessor to distrain ought to be considered as a lease, and not as an assignment; and in *Poultney v. Holmes* it was decided, that a party might sue in debt upon such a demise. This was a lease in fact, though even if it had been an assignment it might have been received in evidence; for it would have been an assignment by operation of law, which the statute of frauds does not require to be in writing; but the transaction was in fact a lease, and the finding of the jury on both the issues was proper. If the plea itself is bad the defect is on the record, and the parties may proceed further; but on this we give no opinion. My Brother *Park* (a) concurs as to the correctness of the finding. The rule must be discharged.

BURROUGH J. was of the same opinion.

GASELEE J. In *Smith v. Mapleback*, the Court held that the lessor could not distrain upon a demise like the present, though it was held to be sufficiently a demise to entitle him to sue in *assumpsit* for the sum reserved.

Rule discharged.

(a) He was at Chambers.

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June 11.

SEATON v. BENEDICT.

1. Payment of money into court upon a general *indebitatus assumpsit* is no admission of a contract beyond the amount of the sum paid in.

2. A husband, who supplies his wife with necessaries in her degree, is not liable for debts contracted by her without his previous authority or subsequent sanction.

ASSUMPSIT for goods sold and delivered. The Defendant pleaded the general issue, except as to 10*l.*, which he tendered and paid into court.

By a bill of particulars, it appeared that the Plaintiff's demand amounted to 28*l.* 5*s.* 6*d.*, for kid gloves, ribbands, muslins, lace, silks, and silk stockings, thirteen pair of which, of a very expensive description, were charged for, as having been delivered on one day.

At the trial before *Burrough J.*, *Middlesex* sittings after *Hilary* term last, it appeared that the Defendant, a gentleman in the profession of the law, was, at the time when the Plaintiff furnished the goods, living with his wife at *Twickenham*, and had supplied her wardrobe well with all necessary articles; that the Plaintiff, a tradesman at *Richmond*, had, without the Defendant's knowledge, furnished the Defendant's wife with the articles for which this action was brought, the greater part of which were delivered to her in the Plaintiff's shop, and the remainder into her own hand at the Defendant's door.

It did not appear that the Defendant had seen her wear any of them, except, perhaps, the gloves and some of the silk stockings, the price of which did not amount to 10*l.*

On behalf of the Defendant it was contended, that these articles were not necessary for the wife of a person in his degree; that no actual authority for them had been proved; and that an authority could not be implied for the purchase of any thing but necessaries.

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The learned Judge told the jury he should have been of this opinion, but for the plea of tender; that plea admitted that the wife had authority to purchase some of the articles; and as it was not stated in respect of which of them the tender had been made, it must be taken to apply to all, admitting the authority to purchase them all, and contesting only the price at which they were charged.

A verdict, therefore, was taken for the Plaintiff for 18*l.* 5*s.* 6*d.*, with leave for the Defendant to move to set it aside, if the learned Judge should be thought to have given an effect to the tender which it ought not to have.

Wilde Serjt. accordingly obtained a rule *nisi* for a new trial, on the ground that the goods furnished were not necessaries, and that no authority could be implied from the tender except an authority to purchase goods to the extent of 10*l.*

Taddy Serjt. shewed cause. The finding of the jury decides that the articles in question were necessaries in the Defendant's station; and his authority for the purchase of them must be implied from the tender. The tender admits the existence and validity of the contract made by the wife; and as it does not distinguish any particular articles in respect of which the money has been paid into court, it must be taken that the only matter in dispute is the amount of the price. In *Bennett v. Francis* (a), where a defendant who had possessed himself of goods belonging to the plaintiff, and had sold part and kept the residue in specie, paid money into court generally upon a declaration containing a count for goods sold and delivered, it was held he admitted the transaction to have been converted into a contract.

(a) 2 B. & P. 550.

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In

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In *Montague v. Benedict* (a), where the husband was held not liable, the articles were not necessities; and in *Holt v. Brien* (b), and *Bartley v. Griffin* (c), the credit was given to the wife. If this were the case of any other agent, as of a servant, no doubt could be raised, after the tender, of the validity of the contract.

Wilde. The tender does not admit a contract beyond the amount of the sum paid into court; *Cox v. Parry* (d); nor that the goods sold were the property of the Plaintiff; *Blackburne v. Schoales* (e); and will not render the Defendant liable if he would not be so upon the facts of the case: as to which, the wife must have an authority like any other agent. If she be not supplied with necessities by her husband, there is an implied authority to contract for them; but if she be adequately supplied, an express authority must be shewn. The principle has been clearly laid down in *Montague v. Benedict*. *Holroyd J.* says, "The husband is liable for necessities provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can shew an express or implied assent of the husband to the contract made by the wife." And in *Etherington v. Parrott* (f) it was holden that the husband was not liable where his wife took up goods and pawned them.

BEST C. J. I think there ought to be a new trial in this case. The learned Judge left the point correctly to the jury, but gave too much effect to the payment of money into court. Independently of that, the De-

(a) 3 B. & C. 631.

(b) 4 B. & A. 252.

(c) 5 Taunt. 356.

(d) 1 T. R. 464.

(e) 2 Campb. 341.

(f) 1 Salk. 118.

fendant,

fendant, in point of law, was entitled to a verdict. A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessaries he makes her impliedly his agent to purchase them. If he supplies her properly, she is not his agent for the purchase of an article, unless he sees her wear it without disapprobation. In the present case the husband furnished his wife with all necessary apparel, and he was ignorant that she dealt with the Plaintiff. No article was delivered in his presence, nor was there distinct proof that any had been worn. If, therefore, money had not been paid into court, the Defendant was clearly entitled to a verdict. What, then, is the effect of that payment? If the money had been paid in on the first items of the bill, an authority to contract at the date of these items would have been acknowledged — an authority which could not afterwards have been retracted but by express notice. But there is no evidence to shew that the money was not paid in on the last items; and if so, there was no agency for the first. The payment into court, therefore, recognizes no agency beyond the amount of 10*l*. And if so, there is no pretence for supporting this verdict. It may be hard on a fashionable milliner that she is precluded from supplying a lady without previous enquiry into her authority. The Court, however, cannot enter into these little delicacies, but must lay down a rule that shall protect the husband from the extravagance of his wife.

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GASELEE J. (*a*) It is difficult to lay down an abstract rule with respect to the liability of the husband; but on the subject of the payment of money into court I

(*a*) *Park J.* was at the Old Bailey, and *Burrough J.* gave no opinion.

entertain

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entertain no doubt. Payment into court generally in *assumpsit* admits nothing beyond the amount of the sum paid in. Where, indeed, there is a special contract the payment into court admits that contract; but where, as in the common *indebitatus assumpsit*, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due.

In *Cox v. Barry*, *Blackburne v. Schoales*, and *Bennett v. Francis*, the claim arose on a single transaction.

On these grounds it seems to me that too much weight was attached to the circumstance of the payment into court. The jury were probably embarrassed by it, and the verdict ought not to stand.

Rule absolute.

June 13.

CROFTS v. STOCKLEY and Another.

If it appears on the whole, that the condition of a bail-bond is to appear in the Common Pleas, it may be described as such in the declaration, although the expression on the bond is, "to appear before our lord the King at Westminster," instead of, "before the justices of our lord the King."

DEBT on a bail bond by the assignee of the sheriff.

The declaration, after alleging that the Plaintiff had sued out of the court of our lord the now King, before Sir *W. D. Best*, knight, and his companions, then his Majesty's justices of the Bench at *Westminster*, a certain writ by which our said lord the King commanded the sheriff that he should take *William Wright*, if found in his bailiwick, and safely keep him, so that he might have his body before *the justices* of our said lord the King at *Westminster* on the morrow of *All Souls* then next, to answer, &c., and after averring the indorsement of the writ for bail, the caption of *Wright*, and the taking the bail bond for his appearance, stated the condition of the bond to be that *Wright* should appear, according to the exigency of the said writ, in the said court

court on the morrow of *All Souls*, to answer the Plaintiff in a plea of trespass, and also to answer him according to the custom of his said Majesty's Court of Common Bench in a certain plea of debt.

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At the trial before *Park J.*, *Middlesex* sittings after last *Hilary* term, the condition of the bond appeared to be for *Wright* to appear before our said sovereign lord the King at *Westminster*, on the morrow of *All Souls*, to answer the Plaintiff in a plea of trespass, and also to answer him according to the custom of the King's Court of Common Pleas, in a certain plea of debt.

A verdict having been found for the Plaintiff, notwithstanding it was objected that there was a material variance between the condition of the bond given in evidence and that set out in the declaration,

Ludlow Serjt. obtained a rule *nisi* to enter a nonsuit on the ground of this variance. In *Renalds v. Smith* (a) it was holden that a condition to appear before the King at *Westminster* was a condition to appear in the Court of King's Bench.

Merewether Serjt. shewed cause. Coupling the *actum* clause with what precedes, it is sufficiently plain that the condition of the bond is to appear in the Court of Common Pleas, as alleged in the declaration.

Ludlow. If the pleader had set out the bond truly the declaration would have been demurrable, and he ought not to escape the consequences of a demurrer by a palpable mis-statement.

BEST C. J. In *Renalds v. Smith*, Gibbs C. J. says, "Taking the whole record together, I cannot doubt

(a) 6 Taunt. 551.

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that the bail-bond points out the Court of King's Bench." I cannot doubt here that, taking the whole of it together, the bail-bond points out the Court of Common Pleas, and that the statement in the declaration corresponds in substance with it. The rule must be
 Discharged.

June 14.

LEES v. WHITCOMB. (a)

A written agreement, "to remain with A. B. two years for the purpose of learning a trade," is not binding, for want of an engagement in the same instrument by A. B. to teach.

ASSUMPSIT. The Plaintiff declared, in the fourth count of his declaration, that in consideration the Plaintiff, at the special instance and request of the Defendant, would receive the Defendant into his service, and cause her to be taught the trade and business of a dress-maker and milliner by the wife of the Plaintiff, the Defendant agreed and undertook and faithfully promised the Plaintiff to continue with the wife of the Plaintiff for two years, from the 5th of *June* 1826, for the purpose of learning the business.

Averment of the Defendant's reception and instruction by the Plaintiff's wife, and of her staying in his service till *April* 14. 1827. Breach, her refusal to remain in his service for the remainder of the period of two years.

In the fifth count the consideration was stated to be simply the receiving the Defendant into his service, and the undertaking, to serve.

There were other counts; but these came nearest to the agreement between the parties, and were the only ones relied on. Plea, *non-assumpsit*.

(a) Communicated to the editor by a gentleman at the bar.

At

At the trial before *Park J.*, *Middlesex* sittings after *Hilary* term, the Plaintiff, in support of his action, gave in evidence the following agreement, signed by the Defendant:—

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“ I hereby agree to remain with Mrs. *Lees*, of 302. *Regent Street*, for two years from the date hereof, for the purpose of learning the business of a dress-maker. As witness my hand this 5th day of *June* 1826.

“ AMELIA WHITCOMB.”

No premium was paid by the Defendant, who, on the day mentioned in the agreement, entered the Plaintiff's house, and left him in *April* following, by which time she had made such progress in learning the business that her services were becoming valuable to the Plaintiff. It appeared that dress-making and millinery were two distinct businesses.

On the part of the Defendant it was objected, that there was no mutuality in the above agreement, and that, therefore, it was not binding on the Defendant; that the Plaintiff not having bound himself to teach, although the Defendant had agreed to remain and learn, there was an entire absence of consideration for the Defendant's agreement; and that the agreement given in evidence did not correspond with that set out in the declaration. The Plaintiff was thereupon nonsuited, with leave to move to set aside the nonsuit, and have a new trial.

Taddy Serjt. moved accordingly, and a rule *nisi* having been granted,

Wilde Serjt. shewed cause.

The fifth count is not supported by the evidence, because a contract to serve is very different from a contract to learn. And there is no consideration on the face of the agreement to support the fourth, as there ought to be under the statute of frauds. *Wain v.*

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Warlters (a), Saunders v. Wakefield (b), Jenkins v. Reynolds. (c) The Plaintiff does not bind himself to teach, nor is the agreement even signed by him as a party to be charged.

The Court here called on

Taddy. The Defendant could not engage to learn without an implied engagement on the part of the Plaintiff to teach, so that the consideration sufficiently appears in the engagement to learn. [*Per Curiam.* The fourth count alleges the consideration to be to teach the business of a dress-maker and milliner; it was proved that the two businesses were distinct, and the writing put in evidence mentions only the business of a dress-maker.] But the word *service* as employed in the fifth count is usually and properly applied on the relation between master and apprentice, *Rex v. Lynn (d)*, and, therefore, includes the required consideration of the teaching, and gives sufficient mutuality to the contract. As to the omission of the Plaintiff's signature, it is sufficient if a memorandum of a bargain be signed by one of the parties to the contract: *Egerton v. Matthews. (e)*

BEST C. J. I am of opinion that none of the counts are proved. The contract does not bear the meaning which is put upon it in the declaration. The businesses of milliner and dress-maker are very different, and that disposes of the fourth count. The fifth count alleges the consideration to be the Plaintiff's receiving the Defendant into his service, and the undertaking, an engagement to serve; but there is by the contract no obligation on the Defendant to serve; her engagement is merely to

(a) 5 East, 10.

(b) 4 B. & A. 595.

(c) 3 B. & B. 14.

(d) 6 B. & C. 97.

(e) 6 East, 306.

remain

remain for two years; and the Plaintiff could not have compelled her to serve. It was probably the Plaintiff's intention to prevent the Defendant from leaving him and setting up for herself the moment she had learned his business, and there might have been a sufficient consideration for that if he had undertaken to teach; but there is nothing in the agreement to insure such instruction to the Defendant.

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BURROUGH J. There is no consideration expressed in the agreement for the Defendant's undertaking; and since the case of *Wain v. Warlters* that is indispensable.

GASELEE J. The service in the fifth count is alleged generally, and not as a service for the purpose of learning. I feel some difficulty, but not sufficient to render it necessary for me to differ from the rest of the Court.

Rule discharged.

HILLS v. STREET.

June 16.

ASSUMPSIT for money had and received by the Defendant to the use of the Plaintiff. At the trial before Gaselee J., *Middlesex* sittings after *Michaelmas* term last, it appeared that the Defendant, as broker for *H. Elwes*, had on the 28th of *April* 1827 distrained on the Plaintiff for 290*l.* 10*s.*, alleged to be due to *Elwes* for seven quarters' rent.

A tenant distrained on for rent requested the broker not to proceed to sale, and engaged, in consideration of forbearance, to pay the broker's charges.

Time was given, and the charges paid, but the tenant objected to the amount of them, and to the amount of rent demanded: Held, that this was not a voluntary payment, and that the charges, if irregular, might be recovered back in an action for money had and received.

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The Defendant, upon written requests made by the Plaintiff from time to time, and on condition of his paying the charges for distraining, forbore to remove or sell the goods distrained, the Plaintiff engaging to pay the expence of keeping a man in possession. Accordingly, the rent not having been satisfied, the Plaintiff, upon the Defendant's instances, paid him on the 18th of *May* 8*l.* 5*s.* as broker's commission on a distress for 230*l.* 10*s.* (at the rate of 5*l.* for the first hundred, and 2*l.* 10*s.* for every hundred over,) 4*l.* 4*s.* for the expences of a man in possession twenty-one days, and 1*l.* for drawing the form of the above-mentioned requests. On the 11th of *June* he again paid the Defendant for the expences of the man in possession twenty-four days 4*l.* 4*s.*, and for drawing four more requests 1*l.*, making altogether 19*l.* 5*s.*, which the Plaintiff now sought to recover, as having been illegally demanded and paid.

The man in possession having on the 23d of *June* quitted the house for the purpose of procuring a van to remove the goods distrained, the Plaintiff refused to let him in again. In consequence of this a second distress was made on the 16th of *July*, when the Plaintiff replevied.

Early in the transaction the Plaintiff had alleged that only six quarters' rent were due, but it did not distinctly appear at the trial whether before or at the time of the payments made to the Defendant the Plaintiff had expressed any intention to replevy. It appeared, however, that he had objected to the amount of the Defendant's charge, when the Defendant said, "The law allowed it, and he would have it."

For the Defendant it was contended, that the charge for making the distress was reasonable and legal, and that whether the charge for keeping the man in possession were legal or not, yet that having been incurred at the express request of the Plaintiff for his sole accommodation, and having been paid voluntarily with a full

full knowledge of all the facts, it could not now be recovered at the hands of the Defendant. *Brisbane v. Dacres.* (a)

The learned Judge thought, that as the distress, in respect of which the charges were made, had never been brought to a conclusion, the goods not having been sold, but having actually been replevied under a subsequent distress, it was doubtful whether the charge for distraining could be sustained, (the stat. 57 G. 3. c. 93. s. 6. applying only to cases where the goods distrained are sold,) and whether the payment could be esteemed voluntary; which he told the jury it could not, if at the time it was made the Plaintiff intended to replevy.

Whereupon a verdict was found for the Plaintiff for 5*l.* 10*s.* on the sum paid for making the distress, with leave for the Defendant to move to set it aside and enter a nonsuit instead. Accordingly

Wilde Serjt. in *Hilary* term last obtained a rule *nisi* to that effect; against which

Andrews Serjt. was to have shewn cause; but the Court called on

Wilde to support his rule. The Plaintiff's action is wrongly conceived. If he mean to dispute the validity of the distress, he cannot do it in an action of *assumpsit*; he ought to have tried that question in replevin: *Lindon v. Hooper* (b), *Knibbs v. Hall.* (c) If his complaint is, that the Defendant has demanded and received what he was not entitled to claim, the remedy is not by action for money had and received; *Fulham v. Down.* (d) But the Defendant's demand was legal and reasonable. The

(a) 5 *Taunt.* 143.

(b) *Coamp.* 414.

(c) 1 *Esp. N. P. C.* 84.

(d) 6 *Esp.* 26.

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time and trouble of making an inventory of goods worth 300*l.* or 400*l.* is not overpaid at the rate the Defendant charged; and it would be most injurious to tenants to compel the landlord to sell unrelentingly within the five days; yet this must be the consequence of refusing him the expences of keeping a man in possession, or of disallowing the broker's charge, except in cases where there is an actual sale. At all events, the payments made by the Plaintiff were voluntary, and with full knowledge of his situation; for though the Defendant said that the law allowed the charge, it was at the express request of the Plaintiff that it had been incurred, in order to obtain for himself the indulgence of further time for the discharge of the rent.

The circumstance of the goods not having been sold does not assist the Plaintiff's claim, because the sale was prevented solely by his excluding the man in possession; and he ought not to escape the payment of the expences by taking advantage of his own wrong.

BEST C. J. Although under the circumstances of this case I would allow for the legal expences of making the distress and inventory, yet this rule must be discharged; for that allowance could not be sufficient to turn the scale in the Defendant's favour, the prothonotary stating to us, that on taxation of costs the broker's charge for distraining would not be permitted to exceed one guinea.

But I am clearly of opinion that this was not a voluntary payment. The broker is in possession of goods distrained for rent. The party distrained on is anxious that the goods should not be sold, and that time may be allowed him to pay the rent. The broker requires, as a condition of the indulgence, that he shall be furnished with a written request not to sell, and an undertaking to pay the expences; this is given and enforced, but
it

it is clear that it is given under an apprehension the sale would proceed unless the demand were complied with; and it is impossible to call a payment under such circumstances, voluntary. If the payment were not voluntary, the Plaintiff is entitled to recover back all that was paid improperly, which exceeds in amount the verdict he has obtained. *Lindon v. Hooper* only decides that an action for money had and received does not lie to recover back money paid for the release of cattle damage feasant, though the distress were wrongful; replevin or trespass being the proper form of action to try such a question. But the present question could not have been tried in replevin. There is no form of action but *assumpsit* for money had and received, in which a party can recover money paid, as this was, under distress.

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GASELEE J. The broker is the agent of the landlord, and must look to him for these expences. But the broker, acting as a public officer, has no right to charge for giving time.

The rest of the Court concurred, and the rule was
Discharged.

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June 17.

GULLY and Others v. The Bishop of EXETER
and DOWLING.

Where the Plaintiff's title to an advowson was traced in *quare impedit* through a period of two centuries, and the Defendant's claim arose on the alleged invalidity of a deed of 1672, the Court would not allow him to traverse all the allegations in the declaration, or to plead more pleas than were necessary to contest the deed of 1672.

IN this case, (the details of which see *ante*, vol. iv. p. 525.) the Plaintiff in *quare impedit* having been obliged to trace his title through a period of two centuries, and the Defendant having in forty-three pleas traversed every allegation in the declaration, although the Plaintiffs' claim rested solely on the validity of a deed of 1672, which the Defendant sought to invalidate by setting up a subsequent deed of 1692, the Court rescinded the rule to plead several matters, as having been made an improper use of.

E. Lawes Serjt. thereupon obtained a new rule *nisi*, to plead the several matters following: —

1. That the deed of the 29th of *April* 1672 was fraudulent and void as against subsequent purchasers.
2. *Non concessit* as to that deed.
3. Issue on descent from *Lewis Stephens* to *J. Stevens*.
4. *Non concessit* as to the deed of the 5th *January* 1699.
5. *Non devisavit* as to the will of *J. Stevens*.
6. *Non concesserunt* as to the deed of the 20th *December* 1719.
7. *Nul tiel record* of the fine of *Hilary* term 6 G. 4.
8. That it was not levied to the uses stated.
9. *Nul tiel record* of the recovery of *Easter* term 6 G. 1.
10. *Riens passa* as to the bargain, sale, and release of the 10th and 11th *November* 1731.
11. *Non devisavit* as to the will of *John Davie*.

12. *Riens*

12. *Riens passa* as to the lease and release of the 23d and 24th April 1777.

13. Issue on the descent from *John Davie* to *Joseph Davie*.

14. *Non concessit* as to the grant of the next turn by *Joseph Davie* to *William Slade Gully*.

15. *Non devisavit* as to the devise thereof by *William Slade Gully* to the Plaintiff.

16. The Defendant's title; against which

Wilde Serjt. now shewed cause, and objected, as before, that all the pleas except those which disputed the validity of the deed of 1672, and asserted the validity of the deed of 1692, were an abuse of the rule to plead several matters, being calculated only to put the parties to a great expence, and wholly immaterial to the merits of the cause, so that if the Defendant succeeded on them he would gain nothing.

E. Lawes. Unless the Defendant be permitted to traverse the allegations in the Plaintiff's declaration, it is useless to require the Plaintiff to make them. It has always been the practice of the Court to permit the Defendant to take issue on every matter of fact advanced by the Plaintiff, and to hold him, like the prosecutor in criminal proceedings, to the strict proof of his title. But without resorting to the discretion of the Court under the statute of *Ann*, a Defendant may at common law, if he confines himself to one point in the Plaintiff's case, employ several pleas to meet that point. In the Plaintiff's case here are two points: 1. the allegation of his title; 2. the disturbance by the Defendants: but the disturbance being admitted, the Defendants may apply themselves exclusively to the title, and if that title consists of an allegation of many facts, may traverse them

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them all. In *Rowles v. Lusty* (a), which was a writ of entry for abatement of divers messuages and mills, a plea that *R. S.* devised them to *T.*, who devised them to *S.*, wife of *R. D. C.*, who levied a fine to the tenant, was held not double; and the Court said, "No matters, however multifarious, will operate to make a pleading double, provided that all taken together constitute but one connected proposition or entire point." "Dupli- city is when two distinct matters, not being part of one entire defence, are attempted to be put in issue. But this can never apply to, nor does it preclude a party from introducing several matters into a plea, if they are constituent parts of the same defence; for though it be true that issue must be taken on a single point, yet it is not necessary, nor ever can be, that such single point must consist only of one single fact." In the case of *Robinson v. Rayley* (b), to an action of trespass defendant had pleaded, amongst other things, a right of common. Plaintiff in his replication traversed, that the cattle were the Defendant's own cattle, that they were *levant* and *couchant*, and that they were *commonable* cattle. To this there was a special demurrer, "that the replication is multifarious, and that several matters (specifying them) are put in issue, whereas only one single matter ought to be so." Lord *Mansfield* said, "As to the present case, it is true you must take issue upon a single point, but it is not necessary that this single point should consist only of a single fact. Here the point is the cattle being entitled to common: this is the single point of the defence. But in fact they must be both his own cattle and also *levant* and *couchant*, which are two different essential circumstances of their being entitled to common, and both of them absolutely requisite."

(a) 4 *Bingh.* 428.(b) 1 *Burr.* 316.

BEST C. J. I am glad this question has been fully brought before the Court; for though merely a matter of practice, it is a point of great importance. On the decision of this question it depends, whether suits shall be carried on at great and unnecessary expence, or whether the real object of pleading shall be attained, that of reducing causes to a single point to be tried.

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At common law a defendant was permitted to plead one plea only, and it was a principle that pleadings ought to be true. That can rarely be the case when many pleas are pleaded. But as it was sometimes found difficult to comprise the merits of a defence in a single plea, the statute of *Ann* permitted a party to plead as many as might be necessary to his defence, provided he obtained leave of the Court; thereby confining him to such as might be deemed, in the discretion of the Court, essential to the justice of his cause. We have enough of the merits of this cause before us to see what justice requires. The living in dispute was conveyed by a deed of 1672; the Defendant claims under a deed of 1692, under such circumstances, that if the deed of 1672 is valid, the Defendant can have no interest in the property. The justice of the case, therefore, requires that the Defendant should plead nothing that does not tend to shew the invalidity of the deed of 1672. He, however, insists on going into matters long subsequent even to the deed of 1692. But if his right accrues from that deed, what can he have to do with the subsequent matters?

It has been urged that it is in vain to require the Plaintiff to make certain allegations, if the Defendant may not deny them. But the object of pleading would be defeated, as it is already in some actions, if the Defendant were to put the Plaintiff upon tracing his whole title. The object of pleading is to narrow the matter in dispute to a single point; and a Defendant ought not to be permitted to traverse a series of facts wholly immaterial

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terial to his own claim. Here he ought to break in on the Plaintiff's title but once; that is, to dispute the validity of the deed of 1672: he may find it advisable to do that in more ways than one, and, therefore, he may add the plea of *non concessit*, but he shall only dispute the Plaintiff's title in the point material to him. The practice in criminal proceedings, which has been alluded to, bears no analogy to the present question. The humanity of our law allows the prisoner to put the prosecutor upon proving his case in every particular; but in civil proceeding the interest of both parties requires that they should be put to as little expence as possible. Perhaps we may not be able to return to the ancient simplicity of pleading; but we must approach it as nearly as we can, and remove, if it be possible, that reproach which has lately been so justly cast on the administration of justice. It is an important duty of the Court to exercise its discretion as to pleas, and to render justice as cheap and as expeditious as possible.

PARK J. concurred.

BURROUGH J. I am happy at this opportunity of giving a death-blow to a practice which has improperly prevailed for many years, and which I have long discountenanced.

If in this case the deed of 1672 be set aside all the other issues fall to the ground. As to the practice of the Court, it cannot repeal the statute of *Ann*, and by that statute we are bound to exercise a discretion in the permission we grant to parties to plead several matters. It has been urged that all the issues proposed form but one point of the defence; if that were so, they might all be combined in a single plea. But they raise a great number of points wholly unconnected with the Defendant's claim, and do not in any respect resemble those matters

matters which are usually combined in a single plea, and make in effect but one allegation; as, for instance, that cattle are commonable, and *levant* and *couchant*.

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GASELEE J. The statute of *Ann* would never have been passed if such abuses had been anticipated as have taken place. The existing practice has given a Defendant a most inconvenient advantage over a Plaintiff. Before the passing of the statute of *Ann* a party might have two or three substantial defences to an action, and yet could only bring forward one. The statute has enabled him, where he has more than one, to plead it, with the permission of the Court. Has he more than one in the present case? He may endeavour to perplex the Plaintiff, but his only defence rests on the alleged invalidity of the deed of 1672. It has been urged, that he must refer to the other deeds to throw light on that; but he may do so in the way of evidence, and produce any documents which, in his opinion, tend to shew that the deed of 1672 is fraudulent. What is now asked at our hands is, not to allow an additional ground of defence, but to throw difficulties in the way of the Plaintiff. It is the more necessary, too, for us to be cautious, because, if the Plaintiff be tripped up, it is a matter of doubt whether the Defendant might not be entitled to a writ to the Bishop upon a mere fabricated title; but on that I give no opinion.

It has been argued, that as the Plaintiff brings the Defendant into Court, the Plaintiff ought to stand the shock of all attacks on his title; but the Defendant here has never been in possession, and it is he in fact who brings the Plaintiff into Court, by entering a *caveat* with the bishop. The allegation that the several facts which it is proposed to dispute constitute but one point is far from being correct; and the case of *Rowles v. Lusty* has no application to the present, because the
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several conveyances mentioned in the plea in that case formed but one assurance.

The true principle of pleading several matters is, that if the justice of the case requires that a party should allege several defences, the Court will not prevent it; but they will not allow a party to plead, merely for the purpose of throwing difficulties in the way of his opponent. In the present case there is nothing essential to the Defendant's case, but to contest the validity of the deed of 1672. The Defendant, therefore, shall be put to elect which link of the Plaintiff's title he will contest; and if he contests the deed of 1672, he may plead *non concessit*, and that the deed was fraudulent.

Rule discharged as to the other matters.

June 17.

CHOLMELEY v. PAXTON and Others.

1. Where money, which under a power in a will was directed to be raised by the sale of an estate, and to be invested by trustees with the consent by deed of the

party interested, was invested partly in 1783, without any such consent by deed, and partly in 1806, by the person interested himself, the trustee having become *non compos*, and an act of parliament, reciting these investments, appointed a new trustee, Held, that neither the act nor the lapse of time cured the defective execution of the power, as against a writ of *formedon*.

2. The issue was, whether the money had been invested with the consent of the *cestui que* trust, according to the directions of this will: Held, that it was correct to direct the jury to consider, whether it had been invested with the consent of the *cestui que* trust manifested by deed.

FORMEDON. The Demandant claimed under the will of Sir *Henry Englefield*, who devised the property in question to the use of trustees in trust for his son, *Henry Charles*, for life, without impeachment of waste; remainder to the first and other sons of *Henry Charles* in tail male; remainder to his son *Francis Michael* for life without impeachment, &c. with like remainder to his sons in tail male; remainder to devisor's daughter,

Theresa


Theresa Ann, for life, without impeachment of waste; remainder to her first and other sons in tail male.

The devisor's son, *Henry Charles*, took possession of the property, and died without issue, as did *Francis Michael*; and the devisor's daughter married *Francis Cholmeley* the father, by whom she had issue, the present Demandant, who, upon her death, commenced the present suit.

The Defendants, after taking issue on most of the allegations of fact in the declaration, pleaded eighthly and ninthly,

That the devisor by his will declared his further will to be, that notwithstanding any of the uses or estates before created, the trustees might, from time to time, during the lives of *Henry Charles*, *Francis Michael*, and *Theresa Ann*, or any of them, at the request and by the direction and appointment of the person who, for the time being, should be entitled to the rents and profits of the property in question, signified by deed under his or her hand and seal, attested by two or more witnesses, sell or exchange the property for such prices as to the trustees should seem reasonable; and in case of sale, should invest the money in the purchase of other lands under the same trusts, and till such purchase, in real or government securities, with such consent as aforesaid, testified as aforesaid, the interest to be applied to the same trusts as the rents of the lands.

They then averred the death of the devisor in 1780, and that in 1783, the trustees, (Lord *Cadogan* and Sir *Charles Bucke*,) by indenture of bargain and sale, sold the property in question (being a portion of that devised), for 13,400*l.* (to *William Byam Martin*, under whom the Defendants claimed); and that *Henry Charles Englefield*, (then *Sir Henry Charles*,) by the same indenture, sold the standing timber to him for 2448*l.* (a)

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(a) See 3 *Bingh.* 207.

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It was then averred, that as well as the said sum of 13,400*l.*, as the sum of 2448*l.*, were, with the consent of the said Sir *Henry Charles Englefield*, placed at interest on government securities in the name of Lord *Cadogan*, (who had survived Sir *C. Bucke*,) according to the directions of the said will, for the purposes and on the trusts therein mentioned.

This allegation the Demandant traversed, and issue was joined on the point.

At the trial before *Littledale J.*, last *Berkshire* Summer assizes, the Defendants, in support of their ninth plea, proved, that in 1788 Lord *Cadogan* had invested the 13,400*l.* in real and government securities; and that in the year 1806 Mr. *Nowell*, the solicitor of Sir *Henry Charles Englefield*, having, in the course of conversation with the latter, discovered that Sir *Henry* had received the 2448*l.* for the timber left standing, told him, that as the timber was not cut down he had no right to receive the money, but the same ought to have been paid to Lord *Cadogan*, and held by him on the same trusts as the 13,400*l.* were held. Sir *Henry* then said he would rectify the error, and on the 29th *July* 1806, he transferred to the account of Lord *Cadogan* 3681*l.* 14*s.* 3 *per cent.* consolidated bank annuities, (being the amount of stock, which said 2448*l.* would have purchased at the time the same was paid to Sir *H. C. Englefield*,) and the draft of a deed of declaration of trust thereof was prepared by Mr. *Nowell*, and left for the approbation of Mr. *White*, of *Lincoln's Inn*, the solicitor to Lord *Cadogan*.

Before this draft was engrossed Lord *Cadogan* died, and consequently no declaration of trust was ever executed, nor was the stock accepted by him; but the whole of the money was applied under the trusts of the testator's will,

On

On the 13th *July* 1819, by an act of parliament, intituled
 “ An act for appointing new trustees for carrying into
 execution the trusts and powers contained in the will of
 the late Sir *Henry Englefield*, Baronet,” and to which
 the Demandant was a consenting party,

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Reciting (*inter alia*) the loan of 12,500*l.* to Lord
Middleton, *Marmaduke Constable*, and *Robert Dynely*,
 upon mortgage of estates in *Yorkshire*, and that the
 residue of trust-money arising from sales under the will
 of Sir *H. C. Englefield*, consisted of 4282*l.* 14*s.* 9*d.* 3 *per*
cent. consolidated bank annuities, then standing in the
 name of Lord *Cadogan* in the bank books, (this sum
 was made up of the 3681*l.* 4*s.*, transferred as before
 mentioned by Sir *H. C. Englefield*, and 601*l.* invested
 by the trustees,)


Also the death of *Charles* Lord *Cadogan* in 1807,
 having by his will appointed Lord *Orford*, *Hans Sloane*,
 and *Joseph White*, executors,

Also a commission of lunacy, dated 30th *October*,
 1808, against *Charles Henry*, Earl of *Cadogan*, the
 son, and that Lord *Orford* and *Hans Sloane* were ap-
 pointed committees of his person and estates,

Also that *Francis Cholmeley*, the son, (the demandant,)
 had attained the age of twenty-one years, and under the
 will of Sir *H. Englefield* was the first tenant in tail of
 the manors, &c. thereby devised,

Also that Sir *H. C. Englefield* and *Francis Cholmeley*
 were desirous that the estates, trusts, and powers given
 by the testator's will, which became vested in said
Charles Henry Earl of *Cadogan*, on the decease of said
Charles Lord *Cadogan*, should be vested in new trustees,

It was enacted, that all and singular the manors, &c.
 (except such of them as had been sold,) should be vested
 in *Wm. Cruise* and *Edward Jerningham*, Esqrs., their
 heirs and assigns; and that the said Lord *Orford* and

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Hans Sloane should immediately assign to *Cruise* and *Jerningham* the said sum of 12,500*l.* secured upon mortgage, and all the messuage, &c. comprised therein, and also transfer to *Cruise* and *Jerningham*, the said sum of 4282*l.* 14*s.* 9*d.* 3 *per cent.* consolidated annuities, to the uses, and upon the trusts, &c. subsisting under the testator's will, &c.


The learned Judge directed the jury that the tenants had not established their allegation that the money was invested according to the directions in the will, inasmuch as the will required that the money should not only be laid out with the consent of the tenant for life, but that such consent should be given by a deed attested by two witnesses, whereas no such attested consent had been proved as to the investment of the 13,400*l.*; and the 2448*l.* as not having been obtained by a sale, pursuant to the directions of the will, could not be said to have been invested under the will.

The jury found all the issues for the demandant, and particularly that the 2448*l.* had not been invested under the directions of the will.

Pcake Serjt., in *Michaelmas* term, moved to set aside this verdict, and have a new trial, on the ground that the evidence established the allegation in the ninth plea, and that the jury had been misdirected.

Cross and *Russell* Serjts., who shewed cause, contended that the evidence failed to establish any consent by deed attested; that in the absence of such consent the 13,400*l.* and the 2448*l.* had not been invested pursuant to the directions of the will; that the issue, therefore, directly raised the question as to that consent; and that consequently the direction given to the jury was right. The act of parliament did not alter the case, for
 it

it merely recited that the sales had been made, and the money invested, without sanctioning the investment, or shewing that it had been made pursuant to the directions of the will. They relied on the decision in the same case, *ante*, vol. iii. 207.

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Bosanquet, Peake, and Ludlow, Serjts., in support of the rule. The issue was not whether the investment had been authorized by a consent under a deed attested, but whether in effect it was made pursuant to the directions of the will. And the evidence was sufficient to shew that it was so made. The main object of the will was that the money should not be invested without the consent of the party interested in it. The mode in which that consent should be given was immaterial. That the consent of Sir *H. C. Englefield* had actually been given could not be doubted; the fact of his having so long received, without objection, the interest of the money invested, and having himself invested another portion of it in the same fund, was conclusive; and after such a length of time it might be presumed that his consent had been given with due formality. But, at all events, the act of parliament cured every defect of form, by ordering a transfer of the whole property to new trustees, after a recital of all the previous steps that had been taken. If any of those steps had been deemed incorrect, either the transfer would have been refused, or the defects in the proceeding would have been specifically noticed and remedied.

BEST C. J. The issue was properly left to the jury, and properly found by them. It is impossible to say that these monies were laid out according to the directions of the testator's will. Without discussing the question whether or not a deed attested was essential to the consent of Sir *H. C. Englefield*, it is sufficient to

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observe that one of the sums was not so much as invested by Lord *Cadogan*. In general, *qui facit per alium, facit per se*; but that maxim cannot be applied in the present case, for the legislature appointed new trustees, because the second Lord *Cadogan* was *non compos mentis*; and it is impossible to say that, if he had been in his senses, he might not, if applied to to make the investment which was made by Sir *H. C. Englefield*, have refused to have done so, or to have attempted to patch up a transaction invalid from the beginning.

The rest of the Court concurring, the rule was

Discharged.

June 18.

HOLL and Another v. CAROLINE MARY HADLEY.

Variance.

Evidence that according to the custom of the trade the Plaintiffs delivered coals to *N. H.* daily, and that at the end of every month he gave a bill, payable in two months,

Held, not sufficient to charge Defendant upon a guarantee for the payment of coals to be delivered to *N. H.* at a credit of two months from the delivery.

THE Plaintiffs declared that by a certain memorandum of agreement made between the Plaintiffs and one *Nathaniel Hadley* the younger, and the Defendant, — after reciting that the Plaintiffs had for some time past supplied *Nathaniel Hadley* the younger with coals, on a credit of two months from the delivery, and having been requested to furnish coals to an increased amount, had declined to do so without having some security for the payment thereof, and that accordingly *Nathaniel Hadley* the younger had requested the Defendant to become such security, which she had consented to do, — the Defendant did thereby agree to and with the Plaintiffs, that she would pay and discharge all such sums of money as might thereafter become due to them for coals sold by them to *Nathaniel Hadley* the younger, to any amount not exceeding 300*l.*, in case *Nathaniel Hadley* the younger should not pay the same within

within one month after the expiration of the aforesaid credit of two months; and the Plaintiffs thereby agreed to give the Defendant a further period of three months for making good any claim which they might have to make under the said guarantee, and which should be in equal proportions with *Nathaniel Hadley* and *Charles Simpkin*, who were also guarantees for *Nathaniel Hadley* the younger.

The Plaintiffs, after an allegation of mutual promises to fulfil the agreement, averred a delivery of coals to *Nathaniel Hadley* the younger to a large amount upon the aforesaid credit of two months.

Breach, that although as well the said credit, and the time for payment of the price of the said coals by *Nathaniel Hadley* the younger to the Plaintiffs, as also one month after the expiration of the said credit, had elapsed, heretofore, to wit, on, &c. at, &c. yet *N. Hadley* the younger did not, although he was afterwards, to wit, on, &c. at, &c. requested by the Plaintiffs so to do, pay to the Plaintiffs, or either of them, the said sum of money so due and payable to the Plaintiffs as aforesaid, or any part thereof, but wholly neglected and refused so to do, of all which premises the Defendant afterwards, to wit, on, &c. at, &c. had notice; and although the said further period of three months from the expiration of the said credit of two months, and the said further time of one month, for the Defendant's making good the claim which the Plaintiffs had under the said guarantee, had long since elapsed, and although the equal proportion of the said claim of the Plaintiffs to be borne and discharged by the Defendant in pursuance of the said agreement amounted to a large sum of money, to wit, the sum of 300*l.*, and the Defendant afterwards, to wit, on, &c. at, &c. had notice of the premises, and was then and there requested by the Plaintiffs to pay them the said sum of

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300l., yet the Defendant, not regarding her said agreement and her said promise and undertaking, had not yet paid.

On the trial of the cause before *Best* C.J., at the sittings in *London* in *Easter* term last, the Plaintiffs proved the agreement set forth in their declaration, namely, a guarantee for coals to be supplied to the Defendant's brother on a credit of two months from the delivery. The Plaintiffs' witness who was called to prove the delivery of the goods, stated, that they were delivered according to the custom of the trade, which was, that coals were supplied to the dealer daily during the course of a month, and that on the last day of the month the dealer gave a bill at two months for the amount of the coals supplied in the course of that month, so that he had a credit of three months from the delivery of such of the coals as were supplied on the first day of the month, and more than two months' credit for every parcel of coals supplied, except such as might be delivered on the last day of the month.

On the part of the Defendant it was contended, that this was a dealing at variance with the express language of the guarantee, which was for a credit of two months from the delivery. On the part of the Plaintiffs it was urged, that the delivery being according to the custom of the coal trade, which must have been in the contemplation of the parties at the time the guarantee was executed, the whole supply of coals for each month must be considered as delivered on the last day of the month, which was a delivery within the terms of the guarantee. The Plaintiffs, however, were nonsuited.

Wilde Serjt. having obtained a rule *nisi* to set aside the nonsuit, on the grounds urged on the part of the Plaintiffs at the trial,

Bosanquet

Bosanquet Serjt., who shewed cause, urged that the variance was material; for a large quantity of coals might be delivered on the first day of a month; the dealer might be solvent at the end of two months from that day, and insolvent before the expiration of three; so that by extending the credit in this way to three, the Defendant's responsibility would be enlarged greatly beyond what she had stipulated for; and her agreement contained no mention of the custom of the trade.

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Wilde. It appears from the recital of the agreement to have been the intention of the parties that the supply of coals should be continued on the same footing as before; and the evidence shews that it was the course of dealing between the parties not to reckon the days of the current month, but to consider the coals as delivered all on the last day of the month. There is, perhaps, a latent ambiguity in the agreement, but the evidence has cleared it up.

Cur. adv. vult.

BEST C. J. now said, With every anxiety to get rid of the nonsuit in this case, we are of opinion it cannot be set aside.

Rule discharged.

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June 18.

COATES and Another, Assignees of PLASKETT, a
Bankrupt, v. BAINBRIDGE and Others.

Defendants' agents abroad, by order of Defendants, received money on Defendants' account, and stated the fact in a letter to Defendants. Defendants replied, acknowledging the receipt of the agents' letter, and giving them directions as to the disposition of the money :

Held, that the agent's letter was, coupled with the Defendants', admissible in evidence to charge the Defendants with the receipt of the money.

ACTION for money had and received by the Defendants to the use of Plaintiffs as assignees of *Plaskett*.

At the trial before *Best C.J.*, *London* sittings after *Hilary* term, a verdict was taken for the Plaintiffs for 956*l.* 5*s.*, subject to the opinion of the Court upon a special case, with liberty to turn it into a special verdict. Of this case it is only necessary for the purpose of the present decision to state the following facts, the Court having ordered sundry contested points on which they delivered no opinion, to be re-argued upon a special verdict.

Thomas and *Flaherty*, merchants at the *Cape of Good Hope*, to whom *Plaskett* had been in the habit of consigning goods to be sold on his account, owed 1100*l.* to *Plaskett* before his bankruptcy, which took place on the 2d of *November* 1820.

In *September* 1820, *Plaskett* was much pressed for payment by one *Stevens*, to whom he owed 1000*l.* *Plaskett*, therefore, gave him four bills of exchange for 250*l.* each, drawn on *Thomas* and *Flaherty*, at six, nine, twelve, and fifteen months, together with a letter of advice to them.

After the act of bankruptcy, these bills were returned by *Stevens* to *Plaskett*, and cancelled, because by some mistake they did not correspond with the letters of advice, and *Plaskett* drew in lieu thereof four other bills on *Thomas* and *Flaherty*, at six, nine, twelve, and fifteen months, bearing date the 30th of *October*, but not in fact drawn till after the 2d of *November*.

Stevens

Stevens indorsed these bills to the Defendants as a collateral security for a debt due to them from *Stevens*.

In *February* 1821, Defendants, at the request of *Stevens*, sent these bills with the letter of advice, and a letter of recommendation which they had procured, to *Marsh* and *Cadogan* at the Cape, with authority to present them to *Thomas* and *Flaherty* there. *Marsh* and *Cadogan* answered as follows:—

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“Gentlemen, — The arrival of the *Antelope* on the 11th ult. put us in possession of your favour of the 17th *February* last, enclosing the four bills drawn by Mr. *John Plaskett* on Messrs. *Thomas* and *Flaherty*, each for 250*l.*, at six, nine, and twelve months’ sight.

“For these bills we have this day settled on the conditions of interest deducted 4*l.* 15*s.*, and of your guaranteeing them against future liability on their payment.

“The sum thus paid to us this day, is six dollars 11,475, being 956*l.* 5*s.*, at 140 exchange. For the conversion of this currency, (less our commission,) we must wait necessarily until the first government drawing.

“Hoping that this settlement may favour us with your approbation, we subscribe ourselves very truly,

“MARSH and CADOGAN.”


“Cape of Good Hope,

“2d *August* 1821.

“Messrs. *Bainbridge* and *Brown*, *London*.”

Immediately on receipt of the above letter, the Defendants informed *Stevens* that the bills had been paid to *Marsh* and *Cadogan*. The Defendants afterwards sent the following reply to *Marsh* and *Cadogan*.

“Gentlemen, — We have to acknowledge the receipt of your favour of the 2d *August*, advising your being in possession of ours of the 11th *February*, covering
1000*l.*

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1000*l.* in four bills on Messrs. *Thomas* and *Flaherty*, who had at once complied with the drawer's wishes, and you have settled with them on the conditions of discount deducted 43*l.* 15*s.*, and of our guaranteeing them against future liability of payment. This we do with pleasure, because we are assured the circumstances under which these bills were drawn were fully explained to Mr. *Plaskett's* assignees, who are satisfied therewith, and his accounts passed accordingly; we, therefore, engage to hold you harmless for the stipulation you have entered into on our behalf. We observe you have placed to our credit 11,475 rix dollars, being 956*l.* 5*s.*, the amount received at 140 exchange, and we note for the conversion of this fund into bills (less your commission) you must wait the drawing of government. We shall of course be glad to receive the amount as soon as you can procure the bills, and we beg to offer our thanks for your attention to this matter.

"BAINBRIDGE and BROWN."

"*London, Nov. 21. 1821.*

"Messrs. *Marsh* and *Cadogan.*"

And Defendants again wrote to *Marsh* and *Cadogan* to the following effect: —

"Gentlemen, — We beg to hand you a triplicate of our last respects of the 21st *November*, and feel some surprise that you have never since taken the least notice of your engagement to remit us the 11,475 rix dollars received for our account from Messrs. *Thomas* and *Flaherty*, which agreeable to your letter of 2d *August* you stated you should do as soon as the government drew. Now as we know they have since drawn, we can only presume in the hurry of other engagements ours has escaped. Our friend, *William Effingham Lawrence*, Esq. having occasion to visit the Cape, we
 request,

request, in the event of your not having remitted us the amount, that you will be pleased to pay over to him the 11,475 rix dollars (less your commission).

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"BAINBRIDGE and BROWN."

"London, April 24. 1822.

"Messrs. Marsh and Cadogan."

The Defendants never received the money from *Marsh* and *Cadogan*, they having failed shortly after the date of their letter of *August 2d*.

One question was, Whether the foregoing letters of *Marsh* and *Cadogan* were properly received in evidence to charge the Defendants with the receipt of the money?

Wilde Serjt. for the Plaintiffs. The letters of *Marsh* and *Cadogan*, taken by themselves, could not perhaps be admissible in evidence against the Defendants, the present rule being that though whatever an agent says or writes in the making of a contract is evidence against his principal, the testimony of the agent himself is necessary to prove whatever passes on the subject of the contract on other occasions. But the letters as adopted and acted on by the Defendants, and coupled with the Defendants' letters, are clearly admissible; they are essential to the explanation of the Defendants' letters, and with that explanation the Defendants' letters contain a clear admission that the money in question had been received by these agents on their behalf.

Taddy Serjt. for the Defendants. The Defendants' letters rest altogether upon the representations contained in the letters from *Marsh* and *Cadogan*; but such representations are inadmissible. *Kahl v. Janson* (a), and *Langhorn v. Alnutt* (b), expressly decide that the letters of an agent abroad to his principal, containing

(a) 4 Taunt. 565.

(b) 4 Taunt. 511.

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a narrative of a transaction in which he had been employed, are not admissible in evidence against the principal, as the representation of the agent; and the principle laid down by the Master of the Rolls in *Fairlie v. Hastings* (a), was distinctly recognized.

[*Gaselee J.* There is here a declaration by the Defendants that the money is in the hands of *Marsh* and *Cadogan* as their agents, and it is nowhere contradicted.]

That declaration of the Defendants is only made on the credit of *Marsh* and *Cadogan's* letters, which do not become evidence because the Defendants have given credit to them, otherwise a ready means would be found for admitting most representations from agents, inasmuch as they generally obtain credit at the hands of their principals.

Cur. adv. vult.

BEST C. J. this day, after requiring that the principal question in the cause should be put into a special verdict, and argued again, said on the subject of the evidence, The letters written by the agents, would not have been admissible unless they had been written by the agents while acting within the scope of their authority, upon a matter entrusted to them by their principals. The letters of these agents were written under these circumstances; the principals have adopted what was done by their agents, and having upon the faith of their assertion taken credit for the sum named in those letters, the letters were properly received in evidence.

(a) 10 Ves. 128.

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PARKER v. CROLE.

June 19.

THE first count of the declaration stated, that before and at the time of the grievances complained of, the Plaintiff was possessed of, and lawfully entitled to, a certain interest or share, to wit, 2800*l.* share or interest in the joint stock or fund, commonly called the 3 *per cent.* reduced annuities, transferable at the Bank of *England*, the same 2800*l.* share or interest then standing in the name of the Plaintiff, in the books of the Governor and Company of the Bank of *England* and being of great value, to wit, of the value of 2000*l.* of lawful money, to wit, at, &c.; and that, before and at the time of the committing of the grievances by the Defendant and one *John Tenbrock*, therein-after mentioned, the Defendant and the said *John Tenbrock* (since deceased) carried on the trade or business of stock brokers, in copartnership together, to wit, at, &c.; and the Plaintiff, before the time of the grievances, to wit, on, &c., at &c., retained and employed the Defendant and the said *John Tenbrock*, deceased, in his lifetime, as such partners and brokers as aforesaid, for certain reasonable reward to the Defendant and the said *John Tenbrock*, in that behalf, and then and there made and delivered to the Defendant and the said *John Tenbrock*, as such partners and brokers as aforesaid, a certain letter or power of attorney, whereby she, the said Plaintiff, made and constituted them, the Defendant and the said *John Tenbrock*, or either of them, her true and lawful attornies or attorney, for her and in her name, from time to time to receive all such dividend or dividends as should from time

Bankruptcy and certificate are no bar to an action in tort against a broker for selling out Plaintiff's stock contrary to orders.

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time to time accrue or become due to the Plaintiff, upon or in respect of her said share of and in the said fund or stock; and for her and in her name, and as her act and deed, to make sale of the said share of and in the said fund or stock, or any part thereof; and thereupon it then and there became, and was the duty of the Defendant and the said *John Tenbrock*, deceased, as such brokers and partners as aforesaid, in all things to obey, abide by, and fulfil the orders and directions of her the Plaintiff, in and about the using the said letter of attorney, and in and about the management and selling of the said share of her the Plaintiff, of and in the said stock or fund, under or by virtue of the same letter or power of attorney:

And the Plaintiff said, that at the time of delivering the said letter or power of attorney to the Defendant and the said *John Tenbrock* as aforesaid, to wit, on, &c., at, &c., she, the Plaintiff, did direct and order them, the Defendant and the said *John Tenbrock*, as such brokers of her the Plaintiff, not to sell, dispose of, or transfer the said share or interest of her the Plaintiff, in the stock aforesaid, or any part thereof, without receiving permission and direction of and from her the Plaintiff, for that purpose; and the Defendant and the said *John Tenbrock* then and there received the same letter and power of attorney of and from the plaintiff, under and subject to that proviso, and upon such condition; yet the Defendant and the said *John Tenbrock*, well knowing the premises, but not regarding their duty as such brokers as aforesaid, nor the orders and directions so given to them by the Plaintiff, but contriving, &c. to deceive and defraud the Plaintiff in this behalf, afterwards, to wit, on, &c., at, &c., wrongfully and injuriously, and without any permission, direction, or instruction whatever from her the Plaintiff for that purpose, and against the knowledge
and

and consent of her the Plaintiff, sold and disposed of the said share or interest of the Plaintiff in the stock aforesaid, and converted and disposed of the proceeds thereof to their own use, to wit, at, &c.; and the Defendant and the said *John Tenbrock*, then and there, and for a long space of time, to wit, for the space of four years then next following, craftily and fraudulently pretended to the Plaintiff, to wit, at, &c., that her said share or interest of and in the stock aforesaid, during the time aforesaid, remained unsold, and standing in her the Plaintiff's name, in the books of the Governor and Company of the Bank of *England*, and during all the time aforesaid, there craftily, falsely, and fraudulently concealed from the Plaintiff, that they had so sold and disposed of the said share or interest; whereby the Plaintiff, during all the time aforesaid, and until the death of the said *John Tenbrock*, and until the estate of the said *John Tenbrock* became and was wholly insolvent, was prevented and hindered from commencing any action or suit against the Defendant and the said *John Tenbrock*, or either of them; and the Plaintiff hath thereby lost and been deprived of all availing remedy against the estate of the said *John Tenbrock*, to wit, at, &c.

The second count varied from the preceding only in stating that the Defendant and *Tenbrock* wrongfully and injuriously, and without the consent or direction of the Plaintiff, and against her will, sold and disposed of the said last-mentioned share or interest in the said public fund or stock, and fraudulently and deceitfully took, had, and disposed of the money arising from such sale to their own use; and the Plaintiff, by reason of the several premises in that count mentioned, had wholly lost and been deprived of her said share or interest of and in the said public fund or stock in that count men-

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tioned; and in addition thereto, by means of the premises, and of the said *John Tenbrock* having since died insolvent, she the Plaintiff had been and was prejudiced and hindered, in and about recovering lawful compensation in respect thereof, and had been and was otherwise greatly injured and damnified, to wit, at, &c.

The third differed from the second, only, in stating that the Plaintiff, for certain reasonable reward in that behalf, retained and employed the Defendant and the said *John Tenbrock*, as such stock-brokers as aforesaid, for the purpose, amongst other things, of so selling and disposing of the said last-mentioned stock, and in the meantime receiving the dividends thereon.

To this declaration the defendant pleaded, first, the general issue; secondly, that after the committing of the grievances in the declaration mentioned, and before the commencement of the suit, he the Defendant became bankrupt, &c.; and, thirdly, as to the converting and disposing of the proceeds of the said share or interest of the Plaintiff in the said stock, as in the said first count mentioned; and as to the taking and disposing of the money arising from the sale of the said share or interest of the Plaintiff in the said public stock or fund, as in the said second count mentioned; and as to the taking and receiving the produce of the said share or interest of the Plaintiff in the said stock, as in the third count mentioned, by the Defendant above supposed to have been done, *actio non*; because, after the committing of the said several supposed grievances in the introductory part of that plea mentioned, (if any such were committed,) and before the commencement of this suit, to wit, on, &c., at, &c. the said Defendant became bankrupt; and the said supposed causes of action in the introductory part of that plea and in the said declaration mentioned, and each of them, did accrue to the

the Plaintiff before he the Defendant became a bankrupt as aforesaid, to wit, at, &c.

The Plaintiff joined issue on the first plea, demurred generally to the second, and specially to the third; stating for cause, that the Defendant had not, in or by his said last plea made or attempted to make any answer to any of the material averments and things in the said declaration contained; but that, on the contrary thereof, the said last plea was wholly confined to certain matters, in and by the said declaration alleged as matters of aggravation only; and for that the said last plea was in divers other respects informal, insufficient, &c. Joinder.

Wilde Serjt. was to have supported the demurrer, but the Court called on

Stephen Serjt., who was for the Defendant, to support the pleas. The action, though framed in tort, is in effect an action to recover liquidated damages which the Plaintiff might have proved under the commission; and to the present claim bankruptcy is a sufficient answer. The allegation that the Defendant concealed the circumstances till the Plaintiff lost her remedy against the estate of *Tenbrock*, a supposed joint wrong-doer, is a mere manœuvre of the pleader to parry a plea of bankruptcy, for the Defendant as survivor, is chargeable with the whole claim, and it is nowhere alleged that he is insolvent. As no special damage is alleged, the value of the stock sold is the measure of the damage sustained, and for that, the Plaintiff waiving the tort, might have sued in *assumpsit*, or have proved under the commission; if so, the Defendant's right to be discharged of the claim under his bankruptcy, cannot be divested by the Plaintiff's altering the form of her action. [*Best* C. J. referred to *Parker v. Norton* (a), where it was holden

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(a) 6 T. R. 695.

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that a party who had an election to sue in trover or for money had and received, might sue in trover notwithstanding the bankruptcy of the debtor after the debt accrued.]

But in *Forster v. Surtees* (a), where by agreement between the plaintiffs, bankers at *Carlisle*, and the defendants, bankers at *Newcastle*, the plaintiffs were weekly to send to the defendants all their own notes and the notes of certain other banking houses, and the defendants were in exchange to return to the plaintiffs their own notes and the notes of certain other bankers, and the deficiency, if any, was to be made up by a bill drawn by the defendants in favour of the plaintiffs, at a certain date; it was held that the notes so sent to the plaintiffs by the defendants, constituted a debt against them, which the defendants might pay by a return of notes, according to the agreement; but if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was provable by the plaintiffs under a commission of bankrupt issued against the defendants, on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due and payable; and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the defendants, who had obtained their certificates.

There, too, the action might have been in trover, and yet a plea of bankruptcy was holden sufficient. If it had appeared on the record that the Plaintiff had sustained any damages beyond the loss of the stock, there might have been ground for the demurrer, but no case can be cited in which a party has been permitted to recover by action against a bankrupt a claim for a

(a) 12 *East*, 605.

specific sum, which might have been proved under his commission.

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BEST C. J. If we were to decide in favour of the Defendant, we should overturn all the cases which have been decided on this subject, from *Utterson v. Vernon* to the present time, and reverse the first principle of the bankrupt laws, which is, that a debtor who has conformed shall be protected against his debts, but not against fraud. In *Goodtitle v. North* (a) it was held that bankruptcy is no bar to an action for mesne profits, Lord *Mansfield* saying, "the plaintiff goes for the whole damages occasioned by the tort, and when damages are uncertain they cannot be proved under a commission of bankrupt." In *Parker v. Norton* it was established, that where a plaintiff might, if he chose to waive a tort, prove a debt, yet if he sued in tort for a fraud, the bankrupt's certificate was no answer.

The Plaintiff here says, "I was owner of so much stock, and intrusted the Defendant with a power to sell, but ordered him not to sell; nevertheless, in violation of my order he sold the stock, and kept me in ignorance of the circumstance till he became a bankrupt, and his partner died insolvent. I complain of fraud, therefore, the Defendant having cheated me by abusing the power committed to him." The language of Lord *Kenyon* in *Parker v. Norton* applies exactly on the present occasion: "If ever a case was brought before a court of justice, that was entitled to less favour than others, this, as it is disclosed on the part of the Defendant, is that case." When the case of *Goodtitle v. North* was argued, Lord *Mansfield* said, "the form of action is decisive." Lord *Kenyon*, therefore, did not decide the question for the first time; and *Grose J.* said (b), "what

(a) *Dougl.* 584.

(b) 6 T. R. 700.

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Lord *Mansfield* said in the case of *Goodtitle v. North* is decisive of the present case; and even without that authority I would not consent that the whole system of the bankrupt laws should be converted into a system of fraud by the bankrupt himself. This is not a debt arising out of any contract of the parties; but if it be a debt at all, it arises out of the misconduct of the Defendant."

The case of *Forster v. Surtees* does not touch the point. The action there was *assumpsit*, and the Judges never meant to overrule *Utterson v. Vernon*, *Goodtitle v. North*, and *Parker v. Norton*, but expressly took the distinction between a contract and a tort. If the Plaintiff here had waived the tort by suing in *assumpsit*, and had claimed a debt instead of damages for a fraud, the Defendant's bankruptcy and certificate might have been a bar to the action. As it is, our judgment must be for the Plaintiff.

BURROUGH J.(a) The form of this action, and the allegations in the declaration are decisive of the question before the Court. The conduct of the Defendant was such, that the action against him has properly been conceived in tort, and, under such circumstances, that is decisive according to the decision in *Parker v. Norton*; a decision of four eminent Judges, one of whom, Mr. Justice *Ashhurst*, was eminent for his skill in special pleading. Suppose a party who had been taken in in the purchase of a horse were to sue the seller, a bankrupt, in an action of deceit instead of *assumpsit* on the warranty, could it be said that the sum lost was a debt provable under the commission, and the action of deceit barred by the certificate?

Our judgment must be for the Plaintiff.

(a) *Park J.* was absent.

GASELEE

GASELER J. The principle laid down in *Parker v. Norton* is a sound principle, and has never been contravened.

Judgment for Plaintiff.

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KYMER and Others, Assignees of J. O'BRIEN, v.
LARKIN and Another.

June 19.

THIS was an action of assumpsit, brought by the Plaintiffs as assignees of *J. O'Brien*, a bankrupt, to recover a sum of money from the Defendants, as money had and received to the use of the bankrupt before his bankruptcy, and to the use of the plaintiffs, as his assignees after the bankruptcy.

The declaration contained the usual money counts, and the Defendants pleaded the general issue. At the trial of the cause before *Park J.*, *London* sittings, before *Michaelmas* term, 1827, a verdict was taken for the Plaintiffs for the sum of 812*l.*; subject to the opinion of the Court upon the following case, with liberty to either party (if the Court should approve thereof) to turn it into a special verdict.

The Plaintiffs were assignees of *John O'Brien*, who became bankrupt on 18th *October* 1819.

The Defendants were, on and before the 15th *June* 1818, owners of the ship *Lord Cawdor*, whereof *John Brooks* was master, and on or after that day the said

hands of *C.* to discharge Defendants' claim for the hire. *B.* having declined to find a cargo for the homeward voyage, the captain procured one for Defendants, who received the freight on its arrival in *London*.

B. having, subsequently to the said assignment, become bankrupt, Held, that his assignees could not recover from Defendants the proceeds of the cargo attached at *Hayti*, or of the homeward freight.

By charter-party *B.* hired a ship to convey a cargo to *Hayti*, and engaged to find a cargo for the homeward voyage. On the ship's arrival at *Hayti*, *B.* assigned the cargo to *C.* as a security for advances made by him. The hire of the ship not having been paid, Defendants, the owners, under the judgment of a court at *Hayti*, attached the cargo in the

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John Brooks, as agent for the Defendants, entered into a charter-party with the bankrupt, for the ship *Lord Cawdor*.

The bankrupt loaded the said ship, under the charter-party, with a full loading of his own goods, consigned to the bankrupt's agent *Mr. Robert Sutherland*, at *Port-au-Prince*, for sale; and the captain of the ship arrived therewith at *Port-au-Prince*, on or about the 9th August 1818, and delivered the goods to *Mr. Sutherland* there.

On or about the 20th February 1819 the bankrupt, in consequence of monies which had been advanced to him by Messrs. *Campbell and Bowden*, and, in consideration of further advances agreed to be made by them to him, assigned to Messrs. *Campbell and Bowden* the goods so consigned to *Mr. Sutherland*, and, also, another cargo of the bankrupt's, which had been consigned by the bankrupt to *Mr. Sutherland* for sale, by a ship called the *Olive Branch*, as a security for the repayment of such advances: and by the deed of assignment last mentioned, the bankrupt and Messrs. *Campbell and Bowden* constituted and appointed *Mr. Henry Wylie*, then in *London*, and about to proceed to *Port-au-Prince*, and Messrs. *Sureau and Co.*, of *Port-au-Prince*, the attornies of the bankrupt, and of Messrs. *Campbell and Bowden*, to receive and recover from *Mr. Sutherland* the said cargoes, and the proceeds thereof, and to act for them generally in their affairs relating to the charter-party.

Mr. Sutherland died at *Port-au-Prince*, but before his death Messrs. *Sureau and Co.* obtained a transfer of the goods which had arrived in the *Lord Cawdor* from the warehouses of *Mr. Sutherland* into their own warehouses, under and by virtue of the said assignment and power of attorney.

On the ship's clearing at the Custom House in *London*, the bankrupt accepted a bill drawn by the Defendants,

Defendants, according to the terms of the charter-party, at two months, for 368*l.*, on account of freight; which bill was paid when due. On the 17th *December* 1818, the Defendants drew another bill for 366*l.* 15*s.* 3*d.* on further account of freight; the bankrupt accepted this bill, but it was dishonoured when due, and is still unpaid.

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Shortly after the arrival of the ship *Lord Cawdor* at *Port-au-Prince*, Mr. *Sutherland*, as the agent and consignee of the bankrupt, advanced to captain *Brooks* on account of the said ship, the sum of 204*l.* 6*s.*

On the 21st *May* 1819 captain *Brooks* attached the goods which had been carried out of the ship *Lord Cawdor*, at *Port-au-Prince*, in the hands of Messrs. *Sureau* and Co., in an action instituted against the bankrupt there to recover the sum of 1109*l.* 19*s.* 6*d.* for eleven months' freight of the *Lord Cawdor*, at the rate specified in the charter-party, with primage and gratuity, (after giving credit for the acceptances of the bankrupt, and for the sum of 204*l.* 6*s.*, paid to the captain by Mr. *Sutherland*,) and also to recover a penalty of 1000*l.*, mentioned in the charter-party.

Upon the proceedings so instituted as aforesaid, the Defendants' agents recovered from Messrs. *Sureau* and Co. the sum of 2182*l.*; but they only remitted to Defendants 1757*l.* 3*s.* 9*d.*, having deducted and retained their commission, and also deducted and retained 336*l.* 19*s.* 3*d.* for law charges.

Captain *Brooks* on the 22d *May* 1819 wrote a letter to the bankrupt, as follows:—

J. O'Brien, Esq.

Port-au-Prince.

“ Sir. — I have to acquaint you of the death of Mr. *Robert Sutherland*, and also of Mr. *Francis Smith's* departure from hence, whom, I make no doubt, you will see in *London* before this comes to hand.

“ I am sorry to say that Messrs. *Sureau* and Co. will
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not have any thing to do with the vessel, although they sent for me on the 9th *March*, and acquainted me with the transfer of your property over to Messrs. *Campbell* and *Bowden*, and it was their intention to expedite the vessel as quick as possible for *Rotterdam*; since the death of Mr. *Sutherland*, and the arrival of Mr. *Wylie*, they have altered their intentions, and left me to shift for myself, and the inward duties of my cargo not being paid have left me, and my vessel and crew, in a very awkward situation. Chartered as the *Lord Cawdor* was, kept me from acting in any manner for you, and your agents had the liberty of keeping the vessel as long as you pleased.

“ The president not being in town, I can say nothing respecting the vessel: should I be able to get her released I shall put her up as a general ship for *London* on your account. I have made it my business to call on Mr. *Wylie* twice, but he says he has nothing to do with either you or the vessel, which will make me act as my duty towards my owners and you require.

“ I am, &c.

“ J. BROOKS.”

Neither Mr. *Sutherland*, nor Mr. *Wylie*, nor Messrs. *Sureau* and Co., did or would procure any return cargo for the ship *Lord Cawdor*, at *Port-au-Prince*, pursuant to the terms of the charter-party.

Wherefore, in the month of *July* 1819, captain *Brooks* loaded the ship, *Lord Cawdor*, with goods at *Port-au-Prince*, on freight for *London*, where she arrived with and discharged the last-mentioned goods on the 17th *October* following, and the Defendants received for the freight of those goods the sum of 779*l.* 0*s.* 9*d.*, but from that sum the Defendants were entitled to deduct for lighterage and commission, leaving a net balance of 671*l.* 11*s.* 3*d.*

The

The freight of the ship *Lord Cawdor*, according to the terms of the charter-party, from the 17th *June* 1818 to the 17th *October* 1819, amounted to £2666 17s. 4d.

10 *per cent.* primage - 266 13s. 8d.

Total - £2933 11s. 0d.

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The freight up to the time of the attachment, with primage and gratuity, amounted to 2044*l.* 2s. 10d.

By the charter-party, which accompanied the case, *O'Brien* hired the ship for six months, or such longer period as he might think proper to employ her for the voyage. The master was to take on board all such goods and merchandizes as should be tendered to him by the freighter; to sail from *London* for such ports as freighter should order; and on arrival, give notice to freighter's agents, and deliver cargo from alongside according to bills of lading: then, to receive on board such goods as freighter's agents or assigns should tender, and sail to a port in the Channel for orders, and thence to *London* or a port on the Continent. He was not to take on board any goods other than from the freighter. The freighter covenanted to put goods on board, to dispatch the ship from *London* to the *West Indies*, to unship the cargo there, and procure another for *Europe*; to dispatch the ship home to *Europe*; to unload her on her arrival, and to pay freight 1*l.* 1s. per ton per month, to commence from *June* 17. 1818, and continue till final discharge. The owner was to be paid two months' pay on the ship's clearing at the Custom House, by bill at two months, and after six months, a further payment of two months by a similar bill, and the remainder, on the discharge of the ship, in cash. The parties bound themselves for the performance of these covenants in the penal sum of 1000*l.*

By the proceedings in the court at *Port-au-Prince*, which also accompanied the case, it appeared that on the
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petition of *Brooks*, judgment was given against *O'Brien* by default, as absent, for 10,545 dollars for freight of the brig *Lord Carador*: that upon this judgment the cargo was attached as *O'Brien's* in the hands of *Sureau* and Co. That *Sureau* and Co. then alleged they had no property of *O'Brien's*, the whole cargo having been previously assigned by him to *Campbell* and *Bowden*, for a debt due from him to them, and that *Sureau* and Co. were agents for *Campbell* and *Bowden*. That *Wylie* and *Sureau* as agents for *O'Brien*, *Campbell* and *Bowden*, appealed against the judgment, which was then confirmed upon full investigation into the merits of the case on both sides.

The question for the opinion of this Court was,

Whether the Plaintiffs were entitled to recover back all or any of the money so received by the Defendants: if the Court should be of opinion that they were so entitled, the verdict was to stand for such sum as the Court should direct; but if the Court should be of opinion that the Plaintiffs were not entitled to recover any thing, a nonsuit was to be entered, subject, in either case, to the liberty reserved as to a special verdict.

Taddy Serjt. The Plaintiffs are entitled to recover in respect of the goods which were attached by the Defendants at *Port-au-Prince* without sufficient authority: they are also entitled to recover in respect of the freight which the ship earned on her homeward voyage.

The goods belonged to the bankrupt when they arrived at *Port-au-Prince*, and the Defendants had no right to cause them to be attached for the penalty in the charter-party. The charter-party was made in *England*, between *English* subjects, and the voyage was to have been completed at *London*; the law of *England* therefore alone applied to the contract, and the court at *Port-au-Prince* had no jurisdiction.

But

But at all events the Plaintiffs were entitled to the freight earned on the homeward voyage. The homeward cargo was put on board to be conveyed on the bankrupt's responsibility; it could not have been loaded without his implied consent, since the ship was his for the time being; he alone could have demanded the freight of the goods at the hands of the consignees, and he was liable to the Defendants under the charter-party for the hire of the ship. It would be too much to give the Defendants the hire and the freight also.

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Wilde Serjt. contra. The action does not lie. At the time the goods were attached under process of the foreign court, they had ceased to be the property of the bankrupt, who had assigned them to *Campbell* and *Bowden* in payment for advances made by them. It is immaterial, therefore, to the decision of this case, whether the foreign court had jurisdiction or not. With respect to the homeward freight, there having been a distinct repudiation of the engagement to reload under the charter-party, by the bankrupt's agents *Sutherland* and *Surcau* and Co., it is clear that the cargo was procured by the captain on account of Defendants, the owners. The Court here called on

Taddy to argue on the effect of the assignment by the bankrupt, previously to the adjudication in the foreign court. He then urged that it was made merely by way of security, and not to divest the bankrupt of his interest in the goods. The Defendants, at all events, were estopped to deny that the goods or the money arising from the sale of them did not belong to the bankrupt, for they had recovered the money from *Surcau* and Co. at *Port-au-Prince*, as money of the bankrupt's, and under the charter-party between them and the bankrupt.

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rupt. Then as to the homeward freight, inasmuch as a contract by deed could only be discharged by deed, there never had been any repudiation of the charter-party by the bankrupt's agents, but simply an omission to find a homeward cargo, for which omission the Defendants might have recovered damages in an action of covenant, but which did not entitle them to procure freight on their own account.

BEST C. J. The first question is, Whether the Plaintiffs can recover the proceeds of the goods attached at *Port-au-Prince*. I am clearly of opinion that they cannot, because the bankrupt (and the Plaintiffs stand in his place) assigned those goods before his bankruptcy to *Campbell* and *Bowden*, in respect of advances made and to be made by them. The goods, therefore, belonged to *Campbell* and *Bowden*, and the bankrupt could neither have sued for that property nor for its value without impeaching the validity of his own assignment. The validity of the judicial proceedings therefore at *Port-au-Prince* have no bearing on the question, and it is unnecessary for us to discuss any point in the law of nations.

With respect to the claim for the homeward freight, although it is true, generally speaking, that an engagement by deed can only be remitted by deed, it is impossible after what has taken place, to hold that the Plaintiffs have any claim in respect of that freight. It was not brought home for the bankrupt, nor was the ship loaded until his agents had rejected all interest in the freight. Under such circumstances what was the captain to do? was he to go home in ballast, or to procure a cargo for the benefit of his owners? This precludes the bankrupt and his assignees from any claim under the charter-party, if it does not get rid of it. Supposing

posing they were to sue on the charter-party, the answer would be, "The ship was ready for you, but you had no goods to send on board." We think, therefore, that there is no foundation for either of the claims, and that our judgment must be for the Defendants.

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BURROUGH J. expressed a similar opinion, and

GASELEE J., who was at chambers, had desired that his concurrence might be signified.

Judgment of nonsuit.

CARTER and Others v. SANDERSON.


June 19.

DEBT by the master and wardens of the Cooper's Company, on a bye-law of the company, against their steward, to recover a penalty incurred under the bye-law, for not giving a dinner to the company on Lord Mayor's Day. The declaration set forth certain letters patent of the 16 *H.* 7. constituting the company a guild or fraternity, and conferring on them various privileges, and, among others, that the masters, wardens, or keepers, and commonalty for the time being might lawfully and with impunity make lawful and honest meetings, and make *reasonable laws, statutes, and ordinances for the wholesome rule and government of the said mystery according to the exigency of necessity*, as often as and when need should be, so as such laws, statutes, and excuse himself by swearing he is not worth 300*l.*, is a bad bye-law. At all events,

1. In a company constituted by letters patent, with power to make reasonable bye-laws, a bye-law for the steward to provide a dinner for certain members of the company on Lord Mayor's day, with an allowance for doing so, or to pay a fine of 20*l.*, or

2. The allowance is a condition precedent, and ought to be averred.

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ordinances should not anyways be against the laws and customs of his said kingdom of *England*, or of his said city; likewise certain letters patent of the 13 *Car.* 2. confirming the grant of 16 *H.* 7., conferring certain additional privileges on the company, and, among others, that the master, wardens, and assistants of the said company for the time being, or the greater part of them, at any time or times respectively should or might have full power and authority by virtue of the said last-mentioned letters patent, to make, ordain, constitute, appoint, and set down *such reasonable orders and ordinances in writing* as to them the said master, wardens, or assistants, or the greater part of them, for the time being *should seem meet and necessary*, according to their good discretion respectively, as well for and concerning the oaths that should be administered to the master, wardens, assistants, and freemen of the said company, and the necessary officers of and concerning the same, as also for the good order, rule, and government of the master, wardens, assistants, and commonalty aforesaid, and all other members of the said society or thereunto belonging, in and *touching all necessary matters and things concerning the same*; and that whensoever the said master and wardens for the time being should make, ordain, and establish such orders, acts, and ordinances as aforesaid, they respectively should have power therein to provide and limit such reasonable pains, penalties, and punishments, either by fines or amerciaments, or by any other lawful ways or means whatsoever, upon all offenders, breakers, neglecters, or non-observers of the same, or any of them, as the master, wardens, and assistants of the said company, or the major part of them for the time being respectively, should think fit, necessary, and convenient; and that thereupon, or at any time after, the said master, wardens,

or

or keepers of the commonalty of freemen of the mystery of Coopers, *London*, and of the suburbs of the same city aforesaid, or such of them whom it did concern, should or might by virtue of the said last-mentioned letters-patent have, levy, recover, and take the said fines and amerciaments by action of debt or by distress of the goods and chattels of such offender or offenders, according to the laws and statutes of this realm; and the same fines and amerciaments so levied and taken should and might retain, convert, and enjoy to and for the common use and supportation of the said commonalty; all which acts, orders, and ordinances so as aforesaid to be made, his late Majesty King *Charles* the Second did will should be observed and kept under the pains and penalties therein to be contained, so as always such orders, ordinances, fines, and amerciaments be reasonable, and not repugnant or contrary to the laws and statutes of his said late Majesty King *Charles* the Second's realm of *England*, nor contrary to the due custom of his city of *London*. The declaration then averred, that after the making of the said letters-patent of his said late Majesty King *Charles* the Second, and after the acceptance thereof as aforesaid, and before the commencement of this suit, to wit, on the 3d day of *March*, in the fourteenth year of the reign of our late sovereign lord King *George* the Second, one *Bartholomew Clark* then being master of the said company, and one *Daniel Lambert* and one *John Harcourt* then being wardens of the said company, and the major part of the then assistants of the said company being then assembled together at the common hall of the said company, did, by virtue of the power and authority by the said letters-patent of his said late Majesty King *Charles* the Second to them given and granted to make, ordain, constitute, appoint, and set down such reasonable orders and ordinances in writing as to them seemed meet and necessary

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according to their good discretion respectively, as well for and concerning the oaths which should be administered to the master, wardens, assistants, and freemen of the said company, and the necessary officers of and concerning the same, as also for the good order, rule, and government of the master, wardens, assistants, and commonalty aforesaid, and all other members of the said society, or thereunto belonging, in and touching all necessary matters and things concerning the same, and not repugnant or contrary to the laws and statutes of this realm of *England*, nor contrary to the due custom of the said city of *London*; and by one of which said orders and ordinances it was then and there, and is (amongst other things) ordained and established by the then master, wardens, and the major part of the then assistants of the said company, by the authority aforesaid, *that every year, on the first Tuesday in June, or within eighteen days then next after, the master, wardens, and assistants of the said society for the time being, or the greater part of them, should or might elect or choose three persons, being of the livery of the said company, to be stewards of the same company, to provide at their own proper costs and charges, (with such allowance out of the stock of the said company or otherwise as the master, wardens, and assistants of the said company for the time being, or the major part of them, should think fit and convenient to be allowed in that behalf) on the day when the Lord Mayor should be presented at Westminster to take his oath, one dinner at the common hall of the said company, for the whole of the livery or clothing thereof;*

And if any person or persons so chosen steward or stewards aforesaid should refuse to serve or hold the office of steward, and to do and perform as aforesaid, having no reasonable cause to the contrary, to be admitted and allowed of by the said master, wardens, and assistants for the time being, or the major part of them, then

then each and every of them so refusing should forfeit and pay to the master and wardens of the company, upon reasonable demand, the sum of 20*l.* to the use of the company; *provided always, that if any person so elected as aforesaid should within the space of one calendar month after notice given him of such his election, go before one of his Majesty's justices of the peace for the city of London or county of Middlesex, and make oath in writing that he was not at the time of such election, or at the time of such making oath as aforesaid, worth to the value of 300*l.* of lawful money of Great Britain, in estate real or personal, of any sort, kind, or nature whatsoever, or to that or the like effect, and should within the time aforesaid produce and leave the said writing with the master and wardens of the company, or either of them, then and in such case every such person should be wholly excused, freed, and discharged from all payments, fines, and forfeitures incurred by not conforming to the said ordinance; and in case any such person should in a subsequent year or years be elected again into the said office of steward of the said company, such person again making oath in writing, and producing and leaving it as aforesaid, should be excused, freed, and discharged as aforesaid, and so as often as the like case should happen: which said orders, bye-laws, and ordinances were afterwards, to wit, on the 3d day of June, in the year of our Lord 1741, to wit, at London aforesaid, in the parish and ward aforesaid, examined and duly approved, ratified, and confirmed by the Right Honourable Philip Lord Hardwicke, Baron of Hardwicke, then Lord High Chancellor of Great Britain, Sir W. Lee, knight, then Lord Chief Justice of his late Majesty King George the Second's Court of King's Bench, and Sir John Willis, knight, then Lord Chief Justice of his late Majesty King George the Second's Court of Common Pleas, according to the form and effect of the statute in such case*

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made and provided: of which said orders, bye-laws, and ordinances the said Defendant afterwards, to wit, on the 5th day of *June*, in the year of our Lord 1827, to wit, at *London* aforesaid, in the parish and ward aforesaid, had notice. And the said Plaintiffs in fact say, that after the making of the said orders, bye-laws, and ordinances as aforesaid, and after the same were so examined, approved, ratified, and confirmed as aforesaid, and before the commencement of this suit, to wit, on the 28th day of *May*, in the year last aforesaid, being the *Monday* next before the feast of *Pentecost*, otherwise called *Whitsuntide*, in the year last aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid, the said Plaintiff *Robert Carter* was duly elected master of the said company, and the said Plaintiffs *Abraham Algar* and *James Francis Firth* were duly elected wardens of the said company; and that the said Plaintiffs afterwards, to wit, on the 5th day of *June*, in the year last aforesaid, being the first *Tuesday* in *June*, in the year last aforesaid, &c., were respectively duly sworn into the said offices of master and wardens of the said company, and from thence hitherto have been and still are respectively master and wardens of the said company, to wit, at, &c. And the said Plaintiffs further say, that after the making of the said orders, bye-laws, and ordinances as aforesaid, and after the same were so examined, approved, ratified, and confirmed as aforesaid, and after the said Defendant had notice of the same, and before the commencement of this suit, to wit, on the said 5th day of *June*, in the year last aforesaid, being the first *Tuesday* in *June*, in the year last aforesaid, to wit, at, &c., the said Defendant and one *Heffield Rosling*, and one *Thomas Giles*, (they the said Defendant, the said *Heffield Rosling*, and the said *Thomas Giles*, then and there being respectively of the livery of the said company,) were by the then master and the then wardens

wardens of the said company, and the major part of the then assistants of the said company for the time being, duly elected and chosen to be stewards of the said company for the purpose in the said bye-law mentioned; of which said election and choice of him the said Defendant, he the said Defendant afterwards, to wit, on, &c., at, &c., had notice. And the said Plaintiffs further say, that, although he the said Defendant afterwards, to wit, on, &c., at, &c., was in due manner summoned to be and appear at the meeting of the said company to be holden on the 9th day of *November*, in the year of our Lord 1827, — being the day on which the Lord Mayor for the said city was presented at *Westminster*, to take his oath, — to take upon himself the office of one of the stewards of the said company as aforesaid, and although afterwards, to wit, on, &c., the Lord Mayor for the said city was presented at *Westminster* to take his oath, to wit, at, &c., and although he the said Defendant did not within the space of one calendar month after notice given him of such his election as aforesaid, go before one of his Majesty's justices of the peace for the said city of *London* or county of *Middlesex*, and make oath in writing that he the said Defendant was not at the time of such election, or at the time of such making oath as aforesaid, worth to the value of 300*l.* of lawful money in estate real or personal, of any sort, kind, or nature whatsoever, or to that or the like effect; yet the said Defendant, not regarding the said orders, bye-laws, and ordinances as aforesaid, did not nor would provide for the whole livery or clothing of the said company a dinner on the said day when the Lord Mayor for the said city was presented at *Westminster*, to take his oath, nor serve or hold his said office of steward, but the said Defendant (although he had no reasonable cause to the contrary) then and there wholly neglected and refused so to do, to wit, at, &c.;

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by means whereof, and by virtue of the said bye-law, he the said Defendant after the making of the said bye-law, to wit, on, &c., at, &c., forfeited to and became liable to pay, and ought to have paid, to the said Plaintiffs, so being the master and wardens of the said company as aforesaid, upon reasonable demand, a large sum of money, to wit, the sum of 20*l.* of lawful money to the use of the said company, which said sum of money, although afterwards, to wit, on, &c. and often afterwards, to wit, at, &c. reasonable demand thereof was made upon the said Defendant by the said Plaintiffs, so being the master and wardens of the said company as aforesaid, is still due and unpaid; *per quod actio accrevit*. The second count charged the Defendant with not taking on himself the office of steward, and not providing dinner for the company, although he had no cause to the contrary. Demurrer and joinder.

Taddy Serjt. in support of the demurrer. The custom as alleged is bad, and the Defendant is not brought within it, even as alleged. The argument used in the *Master and Company of Framework Knitters v. Green* (a), applies exactly to the present case. "The bye-law itself is ill, because that it is not said that this dinner was appointed to the end that the company should assemble and consult of things beneficial to the corporation. For it does not appear but that this was only for luxury. Then the bye-law is unreasonable, to compel a man to make a dinner only for the luxury of others, without any benefit to himself or the rest of the company. Then the bye-law being unreasonable, the penalty to perform it is unreasonable also, and consequently not obligatory. *Quod curia concessit*. And, (by the justices) members of corporations are not bound

(a) 1 *Ld. Raym.* 113.

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to perform bye-laws unless they are reasonable, and the reasonableness of them is examinable by the Judges. Then this bye-law to make the dinner, cannot be good in this case of a new corporation, because it does not appear to what purpose the dinner was made, and it may be only for good fellowship. But if it had been to make the dinner to the end that the company might assemble and choose officers, or any other thing for the benefit of the corporation, it had been well enough." A bye-law in aid of a custom, might perhaps be good; *Wallis's case* (a); or the custom of a corporation by prescription; *Gee v. Wilden.* (b) Here no original custom is stated, and the corporation is by letters patent, not by prescription. At all events, the dinner was to be provided with such allowance as the company should think reasonable; but it is nowhere stated whether any allowance was made or not; nor whether the Defendant was able to provide the dinner. For aught that appears, he might have been a beggar.

Wilde Serjt. contra. There is nothing unreasonable in this bye-law, and it having been approved of (as appears by the pleadings) by Lord *Hardwicke* and the other Judges, every presumption is in its favour. The dinner is not required for the mere purpose of good fellowship, but is given on the occasion of the Lord Mayor's coming to *Westminster* to be sworn into office, of which the Court may take judicial notice. Upon that occasion he is attended by the various city companies, and it is necessary that they should have some refreshment. The responsibility is limited, to provide dinner for a select body; and the fine for neglect is moderate. The case of the *Framework Knitters' Company v. Green* turns on the presumption that the

(a) *Cro. Jac.* 555.(b) 2 *Lutw.* 1320.

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dinner was to be given on a day on which the company had no business to transact; but the necessity of accompanying the Lord Mayor is a business of sufficient importance to justify the custom. It is admitted that a similar custom for a corporation by prescription would be good; it must, therefore, have been good at the time of the creation of such a corporation: if so, why should the same custom be esteemed bad when adopted by a corporation under letters patent? In *Wallis's* case such a custom was holden good: why then should a bye-law in support of it be deemed bad? In *Taverner's* case (a), a bye-law to enforce the payment of a sum of money upon becoming a member of a company was held good, because a party became a member voluntarily; and the same argument is applicable to the present case. In the *Vintners' Company v. Passey* (b), *Denison* J. said in answer to the objection, that the person elected might be unable to pay, "We can never intend that the company would choose persons not meet and convenient." And in *King v. Ashwell* (c), Lord *Ellenborough* said, "In order to avoid a bye-law upon the ground of its being unreasonable, because of some inconvenience that may result from it, it should appear to be a *probable* inconvenience; for one can hardly predicate of any law that some possible inconvenience may not result from it." Here the Defendant has not advanced a single fact to shew that the custom is inconvenient or unreasonable. As to the omission to state an allowance for the dinner, the company could not be called on to make the allowance unless they had the dinner.

BEST C. J. The declaration is insufficient, for want of an averment that the company had offered the De-


(a) *Sir T. Raym.* 446.(b) 1 *Burr.* 235.(c) 12 *East*, 22.

fendant

fendant the due allowance towards the expence of the dinner. But the bye-law has every vice that a bye-law can have. No doubt a bye-law to give a feast may under certain circumstances be good; it may be for the benefit of the corporation, because, if they are called together for purposes of business, it is necessary they should have refreshment, and it may be proper to point out the individual who shall provide it. A custom to such effect, as in the case in *Croke*, may be good upon the admission of members, because upon such occasions all the body are called together. That decision, however, is of doubtful authority, because though a corporation may sue for a fine, they cannot imprison, as they are supposed to have done there.

But a bye-law such as the present cannot be good: the expense of the dinner is a burthen cast on the steward, for which no sufficient reason is alleged. The company are not supposed to be called together for business, but for mere luxury, according to the language in Lord *Raymond*; and the bye-law is one which their charter does not authorise them to make for it is impossible that a dinner uncalled for by purposes of business can be justified under a power to make bye-laws for the good regulation of the company. The case in Lord *Raymond*, therefore, is immediately in point. As to the bye-law's having had the sanction of the Chancellor and the Judges, the bye-law in the case just alluded to must have had that, for it is requisite to all. The bye-law there was to give a dinner to a company on a stated day, or pay a penalty; and it did not appear that any business was to be performed on the occasion: it was argued, "the bye-law is ill, because it is not said that this dinner was appointed to the end that the company should assemble and consult of things beneficial to the corporation: it does not appear but this was only for luxury:" to which the Court agreed,

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“as members of corporations are not bound to perform bye-laws unless they are reasonable; and the reasonableness of them is examinable by the Judges. Then this bye-law cannot be good in this case of a new corporation, because it does not appear for what purpose the dinner was made, and it may be only for good fellowship.” If that bye-law was bad, this must be bad also; the dinner not being required for any purpose but good fellowship.

There is also an uncertainty as to what the Master is to contribute, which is an essential defect in the law; but it is bad on another ground of no light importance, — the impolicy of multiplying oaths, — which ought not to be administered except on solemn occasions for the purposes of justice. This law is enforced by a penalty of 20*l.*, which a defaulter must pay, unless he will degrade himself by swearing he is not worth 300*l.*; an oath which it is illegal to take, and illegal to administer. The oath which must be taken to excuse a man from serving the office of sheriff is necessary for the purposes of justice, in the administration of which the sheriff is deeply concerned; but it is not necessary that an oath should be administered upon the occasion of a dinner, for good fellowship.

BURROUGH J. (*a*) If this decision were to turn solely on the oath, I should have desired time to consider the point, because an oath is not unusual on similar occasions. But the declaration is bad for want of an averment that a due allowance had been made to the Defendant in respect of the dinner; that allowance is a condition precedent by the very terms of the bye-law, for the kind of dinner must altogether depend upon the amount of the allowance.

(*a*) *Parke J.* was absent.

GASELEE

GASELEE J. I think the declaration is bad, for the reason assigned by my Brother *Burrough*. The party who was to provide the dinner was to have an allowance for so doing, and to provide accordingly; and the tender of the due allowance ought to have been averred.

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On the bye-law itself I give no opinion. I doubt whether we can, as it has been contended, judicially take notice of the proceedings on Lord Mayor's day, or of the companies that attend on the occasion in *Westminster Hall*. At all events, it might have been alleged in this declaration, that the company to which the Defendant belongs was bound to attend, and that the dinner was provided in consequence of such attendance. On this bye-law, too, as laid in the declaration, the same person might be appointed to serve as steward every year; and if there be any restriction to such re-appointment, it ought to have been stated.

I give no opinion on the point, whether justices of the peace should administer the oath which has been referred to, although I think it desirable that some other mode should be devised of establishing a right of exemption to serve the office of steward.

Judgment for the Defendant.

HENLY v. The Mayor and Burgesses of LYME.

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CASE, for neglect to repair sea-walls, *per quod*, &c.

An individual who has suffered loss in consequence of the decay of

At the *Dorchester* Spring assizes 1828, before *Lit-
tledale J.*, after the evidence had been gone through, a

sea-walls, which a corporation is directed to repair under the terms of a grant from the crown conveying a borough, and pier or quay with tolls, to the corporation, may sue the corporation for damages.

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verdict was, by consent of counsel on both sides, taken for the Plaintiff on the two first counts of the declaration.

The first, stated, That on the 20th of *June* in the tenth year of *Charles I.*, to wit, at the parish of *Lyme Regis*, in the county of *Dorset*, our said late sovereign by his certain letters patent duly sealed in that behalf, after reciting as therein was recited, did for himself, his heirs and successors (amongst other things), *give, grant, and confirm to the mayor and burgesses of Lyme Regis aforesaid, and their successors, the borough or town of Lyme Regis; and also all that the building called the pier, quay, or cob of Lyme Regis; with all and singular the liberties, privileges, profits, franchises, and immunities to the same town or to the said pier, quay, or cob in anywise howsoever belonging or appertaining; to have, hold, and enjoy the aforesaid borough or town, and also all that the building aforesaid, called the pier, quay, or cob of Lyme Regis, with all and singular the liberties, franchises, privileges, and immunities, to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, to the only and proper use and behoof of them the same mayor and burgesses of the borough aforesaid, and their successors, in fee farm for ever; yielding of fee farm to our said late King Charles I. his heirs and successors, of and for the aforesaid borough or town, with its liberties and franchises, as in the said letters patent in that behalf mentioned; and our said late sovereign King Charles I. did further of his abundant special grace, and of his certain knowledge and mere motion, for himself, his heirs, and successors, pardon, remise, and release to the same mayor and burgesses of the borough or town aforesaid, and their successors for ever, twenty-seven marks, parcel of thirty-two marks of the farm of the same borough and the liberties thereof, anciently by letters patent or in any other manner*

due;

due; and did direct that the aforesaid mayor and burgesses of the borough of Lyme aforesaid, and their successors, all and singular the buildings, banks, sea shores, and all other mounds and ditches within the aforesaid borough of Lyme, or to the aforesaid borough in anywise belonging or appertaining or situate between the same borough and the sea, and also the said building there called the pier, quay, or the cob, at their own costs and expences thenceforth from time to time for ever, should well and sufficiently repair, maintain, and support as often as it should be necessary or expedient: and further, did grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor of the same borough for the time being for ever thereafter, should be clerk of the market within the borough or town aforesaid, and the liberties and precincts of the same; and that the mayor of the borough aforesaid for the time being should do and execute, and might and should be able to do and execute there for ever all and whatsoever to the office of clerk of the market of our said late King *Charles* the First's household there pertained to be done and performed, so nevertheless that the clerk of the market of our said late King *Charles* the First's household for the time being, together with the aforesaid mayor for the time being, might exercise the office above said, and intronit when he would to do any thing which pertained to the office of clerk of the market there in the borough aforesaid, and the liberties and precincts of the same: and further, our said late King *Charles* the First for himself and his heirs and successors, did, by his said letters patent, give and grant to the said mayor and burgesses of the borough and town aforesaid, and their successors, all and singular the fines, amerciaments, and sums of money before the said clerk of the market of the town or borough aforesaid, or the clerk of the market of the said late King *Charles* the First, or his deputy, by
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either or any of the inhabitants of the borough or town aforesaid, after the date and making of said letters patent forfeited or thereafter to be forfeited and assessed in the same borough, to have and enjoy to the same mayor and burgesses of the borough aforesaid, and their successors, to the use of the aforesaid mayor and burgesses and their successors for ever, of the said late King *Charles* the First's gift, without account or any other thing for the same to our said late King *Charles* the First, his heirs or successors, in anywise howsoever to be rendered or paid, and to be levied by their own servants and ministers without estreats thereof to be sent to the exchequer of our said late King *Charles* the First: and, moreover, of his more ample special grace, and of his certain knowledge and mere motion, our said late King *Charles* the First did will and by letters patent did for himself, his heirs and successors, give and grant to the said mayor and burgesses of the borough aforesaid, and their successors, full power, authority, and licence from time to time for ever to dig stones and rocks in any places whatsoever within the borough and parish of the town aforesaid, out of the sea and on the sea shore in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid, called the pier, quay, or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the building aforesaid: and our said late King *Charles* the First did also by his said letters patent will and grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the same mayor and burgesses and their successors should have, hold, use, and enjoy, and might and should be able fully, freely, and entirely to have, hold, use, and enjoy for ever all the liberties, free customs, privileges, authorities, acquittances, and licences aforesaid,

said, according to the tenor and effect of said letters patent, without the let or impediment of said late King *Charles* the First, his heirs or successors whomsoever, our said late King *Charles* the First willing not that the same mayor and burgesses and inhabitants of the borough or town aforesaid, or either or any of them, by reason of the premises or either or any of them, should be thereof hindered, molested, aggrieved, or vexed, or in any thing disturbed by him the said late King *Charles* the First, or by his heirs, or his or their justices, sheriffs, escheators, or other the bailiffs or ministers of the said late King *Charles* the First, his heirs or successors whomsoever: which said letters patent the mayor and burgesses of the borough aforesaid, afterwards, to wit, on the same day, &c. to wit, at, &c. duly accepted, and the same thence hitherto have been and still are one of the governing charters of the said borough, to wit, at, &c. And Plaintiff further said, that said mayor and burgesses from the time of their acceptance of the said letters patent hitherto have had, held, received, and enjoyed all the benefits, profits, and advantages granted to them by such letters patent as aforesaid:

That before and at the time of the committing of the grievances by Defendants as thereafter next mentioned, Plaintiff was lawfully possessed of and in divers, to wit, five messuages, five cottages, five buildings, and divers, to wit, twenty closes of land with the appurtenances, situate and being in the county aforesaid, to wit, in the borough aforesaid:

That before and at the time of committing of the grievances by Defendants as thereafter next mentioned, divers, to wit, five other messuages, five other cottages, five other buildings, and divers, to wit, twenty closes of other land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough aforesaid,

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aforesaid, were in the possession and occupation of divers persons as tenants thereof respectively to Plaintiff, the reversion thereof then and still belonging to Plaintiff, to wit, at, &c. :

All which said several messuages, cottages, buildings, and closes of land, with the appurtenances, before and at the times of the committing the several grievances by Defendants as thereafter next mentioned, were abutting on or near the sea shore there, to wit, &c. :

That before and at the time of the sealing of said letters patent, and the acceptance thereof as aforesaid, by said mayor and burgesses, and also at the time of the committing of the several grievances by Defendants as thereafter next mentioned, divers, to wit, ten buildings, ten banks, ten sea shores, and ten mounds, had been, and were then respectively standing and being within the borough of *Lyme Regis* aforesaid, and divers, to wit, ten other buildings, ten other banks, ten other sea shores, and ten other mounds, had been, and respectively were belonging and appertaining to said borough; and divers, to wit, ten other buildings, ten other banks, ten other sea shores, and ten other mounds, had been and were at those times respectively standing and being and situate between said borough and the sea, to wit, in the borough aforesaid; all which said buildings, banks, and sea shores, and mounds respectively, at the times of the committing of the several grievances by the Defendants, as thereafter next mentioned, were near to, and then and there constituted and formed and were a protection and safe-guard, and still of right ought to form and be a protection and safe-guard to the said several messuages, cottages, buildings, and closes of land of the Plaintiff, with the appurtenances aforesaid, and then and there have hindered and prevented, and still of right ought to hinder and prevent, the sea, and the waves and waters thereof, from running

ning or flowing on, upon, against, or over said several messuages, cottages, buildings, and closes of land last aforesaid: and *all which buildings, banks, sea shores, and mounds, Defendants, at the times of the committing of the several grievances by them as thereinafter next mentioned, were, under and by virtue, and in pursuance of the aforesaid letters patent, and the acceptance thereof as aforesaid, liable to, and ought, at their own proper costs and charges, well and sufficiently to have repaired, maintained, and supported, and still are liable to, and ought, at their own proper costs and charges, well and sufficiently to repair, maintain, and support, when and so often as it should or might have been, or shall or may be necessary or expedient so to do, so as to prevent damage or injury to said messuages, cottages, buildings, and closes of Plaintiff, by the sea, or the waves, or waters thereof, to wit, at, &c.* Yet Defendants, well knowing the premises, and not regarding the said letters patent, or their duty in that behalf, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the Plaintiff, and to deprive him of the use and benefit of his several messuages, cottages, buildings, and closes first above mentioned, and also to injure, prejudice, and aggrieve him, Plaintiff, in his reversionary interest of and in said messuages, cottages, buildings, and closes secondly above mentioned, so being in the possession and occupation of the said persons as tenants thereof to him the Plaintiff as aforesaid, and in which he, Plaintiff, was so interested as aforesaid, theretofore, to wit, on the 1st *January* 1821, and from thence for a long space of time, to wit, continually, until the commencement of this suit, to wit, at, &c., wrongfully and unjustly suffered and permitted the said buildings, banks, sea shores, and mounds, to be and continue, and the same during all the time aforesaid were ruinous, prostrate, fallen down, washed down, out of repair, and in great decay, for want of due,

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needful, proper, and necessary repairing, maintaining, and supporting the same, to wit, at, &c., by means of which said several premises the sea, and the waves, and waters thereof, afterwards, to wit, on the same 1st *January* 1821, and on divers other days and times between that day and the commencement of this suit, to wit, at, &c., ran and flowed with great force and violence in, upon, under, over, and against said several messuages, cottages, buildings, and closes of Plaintiff, and in which he was so interested as aforesaid, and thereby then and there greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said several messuages, cottages, and buildings, and the materials of the same messuages, cottages, and buildings, together with divers, to wit, ten thousand carts load of the earth and soil; and divers, to wit, five acres of the said several closes were washed and carried away, to wit, at, &c. By means of which said several premises, Plaintiff not only lost and was deprived of the use, benefit, and enjoyment of his said messuages, cottages, buildings, and closes in that count first above mentioned, but was also thereby then and there greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in said several messuages, cottages, buildings, and closes in that count secondly above mentioned, so being in the possession and occupation of said persons as tenants thereof to Plaintiff as aforesaid, and in which Plaintiff was so interested as aforesaid; and Plaintiff had been and was, by means of the premises aforesaid, otherwise greatly injured and damnified, to wit, at, &c.

The second count stated, — that *Charles the First*, by his letters patent, “after reciting as therein is recited, and after, among other things, giving and granting to the mayor and burgesses of the said borough certain privileges and advantages, *did direct* that the said mayor and burgesses and their successors should from time to time

time for ever, when it was necessary or expedient, repair at their own costs, all the buildings, banks, sea shores, and other mounds to the borough belonging or appertaining, or situate between the borough and the sea; which said last-mentioned letters patent, the said Defendants, afterwards, to wit, on, &c. at, &c. duly accepted: that the Plaintiff before and at the time of the committing of the grievances by the Defendants, as thereafter mentioned, was lawfully possessed of divers, to wit, five other messuages, &c. and divers, to wit, five other messuages, &c. were in the possession of tenants to the Plaintiff, the reversion thereof being in the Plaintiff, all which messuages, &c. were abutting on or near the sea shore," — and then proceeded nearly *verbatim* as in the first count.

The remaining counts, on which a verdict was taken for the Defendants, alleged the liability to repair as accruing *ratione tenuræ*.

Merewether Serjt. moved for a rule calling on the Plaintiff to shew cause why the judgment should not be arrested on the two first counts, chiefly on the ground that the Defendants' obligation to repair the sea walls being imposed by the letters patent of *Charles the First*, the crown alone could take advantage of a breach of the conditions of that instrument. That the Plaintiff, a mere stranger to the deed, could claim no right under it. That, although an individual might sue a public officer for the neglect of a duty the performance of which the individual might claim of common right without any grant, yet that where a person could never have obtained a given benefit, except as resulting incidentally from a contract between the crown and its grantee, the loss of that benefit was not a wrong for which he could claim any redress by action.

A rule *nisi* having been granted,

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Wilde Serjt. shewed cause. The Defendants, by the acceptance of the grant from the crown, upon condition of keeping up the sea walls, and also as owners and occupiers of the soil, as alleged in the first count of the declaration, are liable, *ratione tenuræ*, to repair those walls; and any individual who suffers by their neglect is entitled to sue them for damages. Where a party is liable to repairs in respect of the ownership of property, the source from which the property is derived is immaterial: for instance, the liability may accrue under an act of parliament, as well as by prescription: *Rex v. Kerrison*. (a) In *Russell v. The Men of Devon* (b) an action was brought against the inhabitants of a county for an injury sustained by an individual in consequence of a bridge being out of repair, and the Court decided against the Plaintiff solely on the ground that the inhabitants of the county were not a corporation. In the case of *Popham v. The Prior of Breamore* (c), one of the judges said: "If he do not scour the foss, trespass lies." So in *Steinson v. Heath* (d) "an action lies for not repairing a bridge by which I am to pass." 1 *Roll. Abr.* 104. pl. 1, 2, which refers to 11 *H. 4.* 82, 83. And it is immaterial whether the party bound to repair be an individual or a corporation. So, an action lies against the owner of a town mill for not grinding; against the owner of a ferry for not keeping his boat in repair (*Com. Dig., Action on the case for negligence*, A. 3.); and in some instances against the parson of a parish for not keeping a bull. *Yielding v. Fay*. (e) From these decisions it appears, that where a party is liable to the performance of a public duty, an injury sustained by a neglect of that duty may be the subject of an action at the suit of an individual. *Com. Dig. ubi supra*. The repair of these walls was a

(a) 3 *M. & S.* 526.(b) 2 *T. R.* 667.(c) 11 *H. 4.* 82, 83.(d) 3 *Lev.* 400.(e) *Gro. Eliz.* 569.

public duty cast on the Defendants by the acceptance of letters patent from the crown, and by the possession of the property of the borough. It is contended, indeed, that the Plaintiff is a stranger to the grant from the crown, and cannot, therefore, take advantage of any of the covenants or conditions attached to it. But a grant from the crown is to be considered largely, and with a view to the advantage of the public, for whose benefit reservations may be made, even in grants by individuals. 11 H. 7. fol. 12. pl. 3. 12 H. 7. fol. 18. And in *Callis*, 118. it is laid down, that “a man may be bound by his covenant to repair a wall, bank, sewer, or other such like matter; and he may bind himself and his heirs to do the same: but yet this covenant will not bind his heirs after his death, unless there be left assets in fee simple, to descend to the said heir from the said ancestor which made the covenant.” “But if land be charged therewithal by tenure *or otherwise*, as a charge imposed upon land by prescription, then the said lands are therewithal chargeable in *cujuscunque manus devenerint; quod nota.*” These grantees, therefore, took the property subject to the burthen of repairs. In *The Mayor of Lynn v. Turner* (a) a corporation was sued for not repairing a creek of the sea; they were charged, indeed, by prescription; but Lord *Mansfield* said, “It might be the very condition and term of their creation or charter,” and the judgment for the Plaintiff was affirmed. But the principle on which individuals are permitted to sue for a neglect of public services under a prescription, is, that the services were reserved on due consideration by the grantor of the property in respect of which they are to be performed; and any act which occasions an inconvenience in the exercise of a public right, may be the ground of such an action. *Greasly v. Codling.* (b) The corporation would not lose their claim

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(a) *Coamp.* 87.

(b) 2 *Bingh.* 263.

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to tolls, even by a neglect of the duties they have undertaken; *Peter v. Kendal* (a); and they cannot be permitted to enjoy the advantage of the grant, and reject the burthen. It may be said, they may be proceeded against by mandamus: a mandamus, however, would not restore the Plaintiff's house, or redress the injury he has sustained.

But, independently of the grant from the crown, the Defendants, as owners of the frontage, whether in possession or not, *Payne v. Rogers* (b), are liable to repair these walls *ratione tenuræ*. *Callis* says (115), "Frontage is where the ground of any man do join with the brow or front thereof to the sea, or to great and royal streams; and it seems that the frontages are bound to the repairs." *Charnley v. Winstanley* (c) and *Perreau v. Bevan* (d), are authorities to shew that against the Defendants, even as owners, the breach of duty is sufficiently alleged.

Taddy and *Merewether* Serjts. in support of the rule. There is nothing in the two first counts of the declaration to charge the Defendants *ratione tenuræ*. It does not so much as appear that they were in possession of the walls in question, but merely that certain shores, mounds, &c. were within the borough. Nor does the record contain anything to shew that the Defendants were liable to the discharge of a public duty, or that they might have been indicted for neglect of it. The charge, such as it is alleged, arises within time of legal memory, on letters patent in the reign of *Charles* the First; but no decision can be found in which a corporation has been charged otherwise than by prescription or *ratione tenuræ*. It is not sufficient to shew that grounds exist which would have borne out an allegation of prescription; it must actually

(a) 6 B. & C. 703.
 (b) 2 H. Bl. 349.

(c) 5 East, 266.
 (d) 5 B. & C. 284.


be alleged that the thing required, if not of common right, has been done immemorially. *Rex v. Great Broughton* (a), *Rex v. Sheffield* (b), *Star v. Rookesby*. (c) In *The Mayor of Lynn v. Turner* it was expressly alleged that the corporation had been used immemorially to repair. So in *Rex v. Mayor of Stratford*. (d) The cases of the ferry, of the parson's bull, and of the town mill, are all prescriptions; and in *Rex v. Kerrison* (e) the Court resisted an attempt to charge a party by reason of his being owner and proprietor, instead of charging him *ratione tenuræ*: so that the Defendants are not chargeable, even though it should appear on the first count that they are owners of the borough. It is argued that the crown has made this grant on condition of certain services. But there is no difference between a grant from the crown and a grant from a subject; and a stranger cannot avail himself of the reservations in the grant. Nor were the services reserved a public duty. If they were the condition of the grant, it was a condition which the crown as grantor might remit, as it did actually remit the payment of the twenty-seven marks. But the test of a public duty is, that the crown cannot remit it; and the punishment for neglect to render services reserved under the grant of a franchise, is loss of the franchise. 2 *Inst.* 219. c. 31. Lord Coke, there, says nothing of indictment as one of the punishments. In *Rex v. The Earl of Exeter* (f) the Defendant, who was indicted for not repairing a gaol, was charged by immemorial usage, and not under the reservations in a grant. In *Greasly v. Codling* the action was brought for a nuisance in stopping a road, and not for a mere omission. The defendant had been guilty of a misfeasance, by which the plaintiff had been put to trouble and expense, and that had before been held a

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LYME.(a) 5 *Burr.* 2702.(b) 2 *T. R.* 111.(c) *Salk.* 335.(d) 14 *East*, 348.(e) 1 *M. & S.* 435.(f) 6 *T. R.* 373.

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sufficient ground of action in *Rose v. Miles*. (a) The passage in *Callis* (115) can scarcely be deemed authority, for the writer adds, "And he whose grounds are next adjoining to a highway, is bound to repair the same:" a proposition which clearly is not law.

Then, the duty or service required is laid too largely. It is not alleged that the houses which have suffered by the sea were standing at the time of the grant; and it cannot be contended that under that grant the Defendants are bound to protect modern erections.

The liability to repair the walls, also, is laid without qualification; and if judgment should be given for the Plaintiff on this declaration, the Defendants would be liable not only to common repairs, but to make good devastations occasioned by extraordinary tempests; a duty which does not fall within any liability to repair: *Keighly's case*. (b) It ought to have been alleged, too, that the Defendants had sufficient funds to enable them to carry on the repairs, since that service is stated in the declaration to be the condition of receiving the tolls. There is nothing, however, in the language of the grant to constitute such a condition, for a condition cannot be created without words of condition or their equivalent. 1 *Roll. Abr. Condition*, p. 407. l. 30.

Cur. adv. vult.

BEST C. J. It appears by the first count of the declaration in this case, that the Defendants are the grantees of the borough of *Lyme*, and of the market, and of certain tolls and dues arising from the possession of a pier or *cob*; and it appears by a public act of parliament relating to the borough of *Lyme*, that these tolls and dues the corporation of *Lyme* have had from all time, at least as far as legal memory can go; but a verdict has been found for the Defendants on all the counts which charge them as being liable to repair

(a) 4 *M. & S.* 101.

(b) 10 *Rep.* 139.

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ratione tenuræ; and a verdict has been found for the Plaintiff only upon two counts, one of which charges that these tolls (which it appears from the declaration were in the crown before the granting of the last charter, and had been granted before to the town of *Lyme* on different terms,) were in the time of *Charles* the First granted to the town of *Lyme*, together with the borough, the right of digging stones upon the shore, and certain other rights which it is unnecessary to enumerate; and then comes that on which this question arises, and which is the condition on which the grant was made: “That the corporation of *Lyme* and their successors, all and singular the buildings, banks, sea-shores, and all other mounds and ditches within the aforesaid borough of *Lyme*, or to the aforesaid borough in anywise belonging or appertaining, or situate between the same borough and the sea, and also the said building then called the pier, quay, or the cob, at their own costs and expences, thenceforth from time to time for ever should well and sufficiently repair, maintain, and support as often as it should be necessary or expedient:” then it is stated “that before the committing of the grievances in question, divers messuages and cottages, and buildings, and divers closes of land, with the appurtenances, in the borough aforesaid, were in the possession and occupation of divers persons, as tenants thereof respectively to the Plaintiff, the reversion thereof then and still belonging to the Plaintiff; all which said several messuages, cottages, buildings, and closes of land, with the appurtenances, before and at the times of the committing of the several grievances by the said Defendants, were abutting on or near the sea-shore there: that before and at the time of sealing of the said letters patent, and acceptance thereof as aforesaid by the said mayor and burgesses, and also at the time of the committing the several grievances,”—so that this allegation relates not only as it was supposed at the bar, to

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to the time of committing the grievances, but to the time of granting the letters patent, — “as well divers buildings, banks, sea-shores, and mounds had been and were respectively standing and being within the borough of *Lyme Regis* aforesaid, and were belonging and appertaining to the said borough, and divers other buildings, &c. situate and being between the said borough and the sea-shore, then and there constituted and formed, and were a protection and safeguard,” that is, at the time of the letters patent, “and still of right ought to form and be a protection and safeguard to the messuages, cottages, buildings, and closes of land, with the appurtenances, and then and there to have hindered and prevented, and still of right ought to hinder and prevent the sea, and the waves and waters thereof, from running or flowing in, upon, against, or over the said several messuages, cottages, buildings, and closes of land aforesaid; all which buildings, banks, sea-shores, and mounds the said Defendants at the times of the committing the grievance were, under and by virtue and in pursuance of the letters patent, and the acceptance thereof, liable, and at their own proper costs and charges, sufficiently to repair.” Then the first count goes on to state that, in breach of this duty, they permitted these sea-banks, sea-walls, mounds, &c. to be prostrate, ruinous, and decayed, so that the sea came in and overran the ground, and overran the cottages which were standing on the ground, and did the mischief which is the subject of complaint.

Now it has been insisted, in the first place, that the Plaintiff claims a degree of protection which the charter does not give him. I think there is no foundation for that argument; for the charter was given expressly for the purpose of protecting the land, and the walls which the corporation were to keep up for that purpose, have been suffered to become in such a state of ruin, that they are incapable of protecting the land, and consequently

sequently the houses put on the land have suffered: the Plaintiff, therefore, does not make a larger claim for protection than he is warranted to make under the grant, provided he is entitled to any protection under that grant.

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It is next insisted, the crown probably might have a right to complain, but that an individual cannot maintain an action for any injury he has sustained from the corporation of *Lyme* not having fulfilled the trusts which the crown reposed in them at the time of the granting this borough; or, rather, not having executed the duty which was the consideration of the grant.

Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that, is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous, that it would be a waste of time to refer to them.

Then, what constitutes a public officer? In my opinion, every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer.

Bishops, certainly, are paid by the crown, not in money, but by estates which have been granted to them; and in consequence of the grant of such estates certain duties have been imposed on the bishops; such, for instance, as holding ecclesiastical courts. Does any man doubt, if a bishop, by neglect to hold an ecclesiastical court, prevents an individual from obtaining probate of a will, by which he sustains an injury, an action might be maintained against such bishop for the consequence of that neglect? Clergymen are public servants to a certain extent, although undoubtedly they are not paid by the public. The emoluments which they receive have not been derived from the public; they have been derived from the owners of particular lands, who have
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endowed them with the glebe or tithes which they possess; yet they have duties cast on them as the consequence of the tenure of those lands and tithes, such as, for instance, to administer the sacrament; and it has been decided, that if a clergyman refuse to administer the sacrament to a man who is thereby prejudiced in his civil rights, an action is maintainable against the clergyman. So if a clergyman were to neglect to register a person brought to be baptized, and in consequence of that, such person should lose an estate, does any man doubt an action could be maintained against him? If the Bank of *England*, refuse to transfer stock, an action may be maintained against them.

Lords of manors hold courts, which courts they are obliged to hold, as one of the considerations on which the lands have been granted to them. If a lord of the manor were to refuse or neglect to hold a court, by which a copyholder should be prevented from having admission to his copyhold, does any man doubt an action could be maintained against such lord?

It seems to me that all these cases establish the principle, that if a man takes a reward, — whatever be the nature of that reward, whether it be in money from the crown, whether it be in land from the crown, whether it be in lands or money from any individual, — for the discharge of a public duty, that instant he becomes a public officer; and if by any act of negligence or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action. If that be so, then it is quite clear that the Plaintiff in this case is entitled to maintain this action. The Plaintiff may say to the corporation, “you have a compensation from the crown for discharging the duty which you have neglected to discharge; and in consequence of that neglect I have sustained an injury; I am, therefore, entitled to have a compensation from you.”

But it has been argued, that this only applies to acts,
and

and not to mere omission. That argument cannot be sustained, because in the case which has been referred to from *Cowper*, the thing complained of was a mere omission or negligence. I should say, therefore, that whether the King ever was bound to keep up these sea walls or not, the King having thought proper to make the grant for the benefit of the public (for it cannot be supposed that the King made this grant, that the good men of *Lyme* should expend the dues so granted either for their individual advantage or in feasting), the instant they accepted it for the benefit of the public, they took on themselves the responsibility of discharging those duties to the public, which it is expressly declared they were to discharge at the time they accepted the borough; and having neglected them, they have become responsible. That would be my opinion, even if I should be satisfied that the King never was bound to repair these walls; but I am convinced that the King was bound at one time to repair these walls, and that the King has shifted the liability which belonged to him upon those to whom he has granted the estate.

Now if the King was bound to repair the walls, and has granted an estate to a person on condition that he shall do it, no man can doubt that this is a binding and valid condition. A man who is bound to do certain acts by reason of the tenure of certain property, if he grants that property, or any part of it, may make it a condition of his grant or his lease that the grantee or lessee shall do that which he was bound to do.

I do not mean to state that the King, by his general prerogative, was bound out of any funds which belong to him to repair the sea wall. He never was so bound. The King by his prerogative, as will be found in every book on the prerogative of the crown, is bound to take care to guard and to protect the shores and lands adjoining the sea from being overflowed by the sea; he is to discharge that duty as it was discharged before the statute

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statute of *Henry* the Eighth, by issuing commissions and making ordinances, which we find he certainly was in the habit of making before the statute of *Henry* the Eighth, calling on persons who had lands near the sea to do their duty in protecting their own lands, and the lands of others, from the incursions of the sea. But it appears here that the King was the owner of the lands of the town of *Lyme*; for it appears on this record, that the King granted the borough of *Lyme*: then, although the King might not have all the demesne lands in the town of *Lyme* at the time of the grant, yet there is ground to presume that the King, at some time, was the owner of all the land in the town of *Lyme*; for the Court of King's Bench held, in the case of *Lord Pelham v. Pickersgill* (a), if you shew that a party is lord of a manor, you may upon that raise the presumption that at some time or other he, or his ancestors, were in possession of all the demesnes of the manor, because the legal history of this country shews that originally all the land belonged to the lord of the manor, and was granted out to the tenants on different conditions and on different services. Proving, therefore, that a man is lord of the manor is sufficient to raise the presumption that in ancient times he was the owner of all the lands within the manor. If that be the case, if the King was lord of the manor, if the King could grant the borough, if the King could grant the sea shore, that is ground on which we will presume, without its being stated on the record, because it is a legal presumption, that the King was at one time the owner of all the lands within the town of *Lyme*. If he was owner of all the lands within the town of *Lyme*, was it not his duty at that time to repair the sea banks? We find from *Callis* that it was the duty of the King at common law to protect the shores from the incursions of the water; but that it became necessary, in consequence of the sea gaining on particular parts of the

(a) 1 T. R. 660.

shore,

shore, to have higher mounds and higher banks than particular individuals were bound to put; and, therefore, it was necessary to raise such mounds and banks by taxation of other parts of the public who derived benefit from those walls: but who in the first instance were bound to repair? who were bound to keep up the sea banks? The owners of the banks. And who were bound to keep up the sea walls? Those who had been in the habit of keeping up and repairing them. According to *Callis (a)* “Frontage is, when the ground of any man do join with the brow or front thereof to the sea, or to great or royal streams; and in cases of the sea or royal rivers, property of the banks and grounds adjoining are and belong to the subject when lands do butt and bound thereon; but the soil of the sea and royal rivers do appertain to the King, as formerly in my tractate on rivers may appear. But in cases of petty and mean rivers, the soil of them, as well as the banks thereon, do appertain to them whose grounds adjoin thereto; so that frontage and ownership in base inferior rivers do not differ; but in great streams and the sea they do vary as aforesaid: and it seems that the frontages are bound to the repairs, and that he whose grounds are next adjoining to a highway, is bound to repair the same.” It was objected that that was stated too largely; and, certainly, if it be taken that the owner of the lands adjoining every highway is bound to repair the highway, it is too large: but, I apprehend, the writer means, that where a man has enclosed on the highway, he is bound to repair. Then he adds: “The ownership of a bank, wall, or other defence is a sufficient warrant to impose the charge of repairs thereof upon him, without being tied thereto by prescription.”

If that be so, how stands this case? The King grants this bank or wall; must he not have been the owner? If he was not, he could not make the grant.

(a) P. 115.

Then,

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Then, if he was the owner of banks or walls, we have it here, on the authority of *Callis*, that he, as the owner of them, was bound to repair. If, as the owner of the banks or walls, he was bound to repair, without any prescription, when he made the grant, could he not cast the obligation on another? It seems to me it is perfectly clear, from what is stated on the record, that the King was bound, as owner of the town of *Lyme Regis*, which, probably, was so called from the property of the town being in him, and as the owner of these very banks and walls, to repair these banks and walls. When he granted to the corporation of *Lyme* the profit and advantage of the tolls, he transferred to them, at the same time, the liability which the receipt of that profit and advantage imposed on him.

I am, therefore, of opinion, that it sufficiently appears on this record, that the Defendants were bound to repair.

But it has been said it does not appear that they have any funds wherewith to do it. As long as they hold this estate, whether the estate produces funds or not, they are bound to repair. When they do not like to undertake the repair, let them desire the King to take back the estate. The moment they accepted the estate, they contracted the liability to repair; and that liability to repair will attach itself to them as long as they continue to be the owners of the estate.

It would be a most dangerous thing to allow a corporation which takes lands under circumstances in which this corporation has taken lands, to say, that “although we have taken these lands *cum onere*, subject to these repairs, we have not funds wherewith to repair, and, therefore, we cannot do it.” In such a case the Court would have to go into an enquiry how the funds had been employed, and it would be extremely improper to impose the necessity of such an enquiry on any court. The learned Judge who tried the cause did perfectly right in rejecting evidence to such a point. The public have
nothing

nothing to do with that. The Plaintiff has nothing to do with that: as one of the public, all he has to enquire into is, who are liable to repair. On these grounds, I am of opinion there is no reason for arresting the judgment.

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I had omitted to mention another point. It is alleged that the Defendants are only commonly liable to repair the walls. Undoubtedly that is all they are bound to do. In a case which I tried at *Gloucester*, an issue was directed by the Court of Chancery, to ascertain whether the owners of land, who were bound to keep certain sea walls in repair, were answerable for a particular loss that had happened; and I was directed to enquire whether that loss had happened in consequence of an extraordinary high flood of the sea, or in consequence of those mounds not being kept in proper repair. The jury found that the mounds were kept in good repair, and that the accident had happened from such a high tide as never had occurred before in the memory of man. I should say, if in this case it had appeared this damage had not happened from any defect of the wall, but had happened from an extraordinary high flood, these Defendants would not have been bound to make good the repairs; but it was decided in *The King v. The Commissioners of Sewers for Essex (a)*, that if a man is bound to repair certain walls, although the flood be very high, yet if it be found that the walls were out of repair, he is liable, because the high flood would probably not have occasioned the mischief if the walls had been in the state he was bound to keep them. In the present case, if there was a high flood, or an extraordinary high tide, it was matter of defence. But it is distinctly stated on this record that the mischief happened from these walls being suffered to be prostrate, ruinous, and in decay, so that the mischief is not from the act of God, the mischief is from the negligence of man, and from the negligence of man only.

(a) 1 B. & C. 477.

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GASELEE J. It has been argued, that the obligation is laid too largely in this declaration; but by analogy to the case of a common carrier, this is stated in the same way; there, you state the liability of the common carrier to carry safely and securely, and you do not except the act of God and the King's enemies, which are the known exceptions; so here it is properly stated to be a general obligation to repair: if by the act of God an extraordinary storm comes, that is a defence, and it is not necessary to state it in the declaration.

Rule discharged.

In *Michaelmas* term an application was made, on the part of the Plaintiff, to the Chief Justice to order the verdict to be entered up on the first count of the declaration, to which the foregoing judgment appears chiefly, if not exclusively, to apply. The parties were required to make their application to Mr. Justice *Little-dale*, and it was "ordered that all further proceedings in this cause be suspended until this Court shall otherwise order." On the 18th of *December* Mr. Justice *Little-dale*, after hearing both sides, declined to interfere, on the ground that the verdict had been taken in the present form before the cause had been heard to its conclusion, by mutual agreement, and that he could not alter the terms of that agreement when either of the parties to it objected to such alteration.

June 20.

FURNESS, Assignee of ALEXANDER COPE and Others, Bankrupts, v. WILLIAM COPE.

A banker's ledger is receivable in evidence to shew that a customer had no funds in the banker's hands.

THIS was an action of *assumpsit* to recover money alleged to have been paid by *Alexander Cope* to the Defendant under a fraudulent preference.

In order to shew the state of the affairs of the bankrupt and his partners just before their bankruptcy, the Plaintiff

Plaintiff at the trial before *Best* C. J., *London* sittings after *Easter* term, produced the ledger of the bankers with whom the bankrupt firm kept cash. The entries in this book were made by various persons. One of the bankers' clerks stated that that was the book to which all the clerks of the house referred, to see whether they should pay the checks of their customers when presented; and it appeared from that ledger that at the time of *A. Cope's* bankruptcy, his firm had nothing remaining in the bankers' hands. It was objected that this book was not evidence, at all events, as against the Defendant, and that the clerks who made the several entries ought to have been called. The objection, however, was overruled, and a verdict found for the Plaintiff.

Upon this ground, and also on the ground that the verdict was contrary to evidence, and did not sustain the promises as laid in the declaration,

Wilde Serjt. moved for a new trial; against which

Merewether Serjt. shewed cause.

It appearing that the evidence was not very clear, the Court pronounced no decision on the objection to the declaration, but granted a new trial, in order that the question might be more distinctly raised. Upon the subject of the bankers' ledger, however,

BEST C. J. said, that it was properly received in evidence, and that great mischief would ensue if the Court were to hold otherwise. The inconvenience of calling all the clerks of the house would be seriously felt, and without the book it would be impossible to prove that the party had no money in the house. To prove the negative, therefore, the book to which all referred, was sufficient, although it might not be admissible to prove the affirmative.

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(IN THE EXCHEQUER CHAMBER.)

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THORPE v. COOPER.

Where commissioners under an inclosure act of 1769 were to make allotments to persons possessing interests in the contiguous townships *A.*, *B.*, and *C.*, and made allotments to a rector in *B.* and *C.* in respect of tithes and glebe to which he was entitled in *B.* and *C.*, and in *A.* in respect of glebe to which he was entitled in *A.*, but omitted to make any specific allotment in *A.* in respect of tithes to which he was entitled in *A.*; the act containing a saving clause for all persons other than

those to whom allotments or compensations should be made in respect of their several interests, Held, that the rector was not barred from suing for his tithes in *A.* in 1825, although the award was to be final unless appealed against in six months.

ERROR from the King's Bench on a bill of exceptions, by which it appeared that this was an action brought on the statute 2 & 3 *Ed.* 6. by the Reverend *William Cooper*, as rector of the parish of *Waddingham*, in the county of *Lincoln*, against *Thorpe*, an occupier of certain arable, meadow, and pasture lands in the parish of *Waddingham*, for not setting out the tithe thereon. The Plaintiff, at the time of the trial of the cause, was, and since the 29th *September* 1811 had been, rector of the parish of *Waddingham-cum-Snitterby*. The Defendant on the 29th *September* 1817 occupied certain arable, meadow, and pasture lands in the township of *Waddingham*, and had cut and carried away divers crops of corn, grain, and hay, grown on such lands, of the value of 4*l.* 18*s.*, without having set forth any tithes, or compounded for them. The parish of *Waddingham* consists of two townships, viz. *Waddingham* and *Snitterby*. Certain proceedings in Chancery in the year 1700 were given in evidence, consisting of a bill, answer, and decree. The bill set out an agreement made between the then rector of *Waddingham* and the owners of lands in the parish, that certain common lands should be inclosed, and that the rector should have a certain portion of the lands, and the annual sum of 94*l.*, in lieu of tithes; and this agreement was confirmed, and ordered to be performed, by the decree. The lands on which

tithes

tithes were claimed by the Plaintiff in this action formed no part of the lands inclosed under the above decree, but were part of the lands inclosed under an act of parliament in 1769, hereinafter mentioned. The above-mentioned composition was proved to have been paid from time to time by the occupiers of land in the township of *Waddingham*, and accepted by the rectors from that time until the year 1788, when a new rector, Dr. *J. Barker*, the immediate successor of *Robert Carter* hereinafter mentioned, succeeded; the composition of 94*l. per annum* was then abandoned, and a new composition agreed upon between the occupiers and the then rector, at a valuation of the whole parish; and such valuation had respect as well to the lands inclosed under the act of parliament hereinafter mentioned as those inclosed under the decree. The Plaintiff was presented to the rectory of *Waddingham* in 1808, and the Defendant paid his share of the composition in respect of the lands in question to the Plaintiff's predecessor, and to the Plaintiff, until the year 1811. From *Michaelmas* 1811 to *Michaelmas* 1812, the Plaintiff took the tithes of them in kind, and from *Michaelmas* 1812 the Defendant refused to pay any composition, or set out his tithes, in respect of the lands in question.

In the year 1769, an act of parliament, entitled "An act for dividing and inclosing certain open fields, lands, and grounds in the several townships of *Atterby*, *Snitterby*, and *Waddingham*, in the county of *Lincoln*," was passed. That act recited (*inter alia*) that the Reverend *Robert Carter*, clerk, was at that time rector of the parish and parish church of *Waddingham-cum-Snitterby*, and as such, was seised of certain glebe lands in the said open fields and grounds, and entitled to all the tithes great and small, ecclesiastical dues, duties, and payments arising within the titheable places of the said parish; and also to the tithes arising upon certain

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parcels of land lying dispersed in the open fields of *Atterby*; and then enacted, that all the said open arable fields, commons, pastures, carrs, and waste grounds, or other open and common grounds in the said several townships, be divided and allotted by certain commissioners appointed to carry the act into execution, and directed such commissioners to assign and allot unto and for the said *Robert Carter* and his successors, rectors of the said parish of *Waddingham-cum-Snitterby* aforesaid, such parcel or parcels of the said arable fields, common pastures, and carrs within the said township of *Snitterby* (except the common pasture called the *Carr-side*), so directed to be inclosed as aforesaid, as should in the judgment of the commissioners, or any two of them, be equal in value to and a full satisfaction for the present glebe lands of the said rector within the last-mentioned lands and grounds so to be inclosed, and then to assign and allot unto and for the said *Robert Carter*, and his successors as aforesaid, such parcel or parcels of the residue of the same arable fields or common pastures and carrs in *Snitterby* aforesaid, and also of the titheable parts of the said townships of *Waddingham* as should (quantity, quality, and situation considered) contain or be equal in value to two full fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of and as a full recompence and compensation for all the tithes, dues, duties, and payments whatsoever belonging to the said rector, and arising, renewing, or happening, or which might arise, renew, or happen within the same lands and grounds; and further, to assign and allot unto and for the said *Robert Carter* and his successors (rectors as aforesaid) such parcel or parcels of the said arable fields of *Snitterby* aforesaid, as by the said commissioners, or any two of them should (quantity, quality, and situation considered), be adjudged to be equal in value to the tithes

tithes of the ancient inclosed lands in *Snitterby* aforesaid. The act further directed allotments to be made in the *Carrside* pasture, equal in value to two-fifteenth parts of the titheable grounds (quantity, quality, and situation considered), to the rector of *Waddingham-cum-Snitterby*, and the vicar of *Bishop Horton*, according to their respective shares and interests in the tithes of the said *Carrside* pasture. It was further enacted, that within six calendar months next after the commissioners, or any two of them, should have completed the division and allotments thereby directed to be made, or as soon after as conveniently might be, they should form and draw up their award or instrument in writing, which should express distinctly and separately the quantity in statute measure of the acres, roods, and perches contained in the said fields and grounds thereby directed to be so set out and assigned; and also the situation, abuttals, and boundaries of each and every the respective townships of *Atterby*, *Snitterby*, and *Waddingham*, and should contain orders and directions as to the repair of the fences, ditches, gaps, stiles, and bridges; and also all such other orders, regulations, and determinations as should be necessary or proper to be inserted in the said award conformable to the tenor and purport of the said act; or for the completing and maintaining the said division and enclosure; and that the said award should within six calendar months after the execution thereof be enrolled by the clerk of the peace of the division of *Linsey*, in the county of *Lincoln*; and that the several allotments and divisions, and all orders, directions, regulations, and determinations so to be made as aforesaid, and declared in and by the said award, should be binding and conclusive unto and upon all the parties interested; and that immediately after the enrolment of the said award, all manner of tithes, ecclesiastical dues, duties, and payments of what nature

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or kind soever, arising, renewing, increasing, payable, or happening within or out of the lands or grounds thereby directed to be inclosed, or within the said ancient inclosed lands or grounds, or otherwise howsoever (except such surplice fees or other payments as were before excepted), and all right of common, right of stray, and right of average upon the said lands and grounds thereby directed to be inclosed, and every of them, should cease and for ever be extinguished. An appeal to the quarter sessions of the peace was given to any person who might think himself aggrieved by any thing done in pursuance of the act, the appeal to be within six calendar months after the cause of complaint, other than and except such orders and determinations of the commissioners as in the act were declared to be final and conclusive. And the justices were required to hear and determine the matter of such appeal; the determination of the said justices was to be final and conclusive to all parties concerned, and not to be removed by *certiorari* or other process whatsoever into any of the courts of *Westminster*. The act contained the following saving clause: "Saving always to the King's most excellent Majesty, his heirs and successors, and to all and every person and persons, bodies politic and corporate, his, her, or their heirs, successors, executors, and administrators, other than and except the respective persons to whom any allotment of land or compensation shall be made by virtue of this act in respect of the interest or property for which such allotment or compensation shall be made, all such estate or interest as they, every, or any of them had and enjoyed, of, in, to, or in respect of the said fields, common pastures, carrs, and waste grounds, or any of them, before the passing of this act, or could or might have had or enjoyed in case the same had not been made; but no such other person or persons, bodies politic or corporate, his, her,

or

or their heirs, executors, administrators, or successors, shall have power to disturb any of the allotments to be made in pursuance of the act, but shall accept their respective allotments which shall be made in lieu of the lands, common rights, tithes, or other interests, which he, she, or they would have been entitled to in case this act had not been made."

The commissioners appointed by the act duly proceeded to make a division and allotment of the several lands and grounds thereby directed to be divided and inclosed; and on the 29th of *November* 1770 duly made and executed their award in writing concerning the same, which award was duly enrolled according to the provisions of the act. By this award the commissioners assigned unto *Robert Carter* and his successors for the time being, rectors of *Waddingham-cum-Snitterby*, as follows:—Three several lots or parcels of ground, containing together 51 acres, 1 rood, 30 perches, statute measure, which they declared to be in lieu of and as a compensation for all the said *Robert Carter's* ancient glebe lands and rights of common in the *North Carr*, *South Carr*, and *Carrside* pasture, and the ace field in *Waddingham* aforesaid. These allotments were figured in the margin of the award under the head of "*Waddingham* allotments," "*Glebe* allotment." At the conclusion of the *Waddingham* allotments, on the sixteenth sheet of the award, there was a marginal note by the commissioners, viz. "Here end the *Waddingham* allotments." And immediately after was the following marginal note, viz. "*Snitterby* allotments begin here." In the sixteenth sheet of the award, in the margin, under the head "*Snitterby* allotments, allotment to the rector in lieu of glebe," the commissioners assigned to the said *Robert Carter*, as rector of *Waddingham-cum-Snitterby*, two several plots or parcels of ground, containing together 33 acres, 3 roods,

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3 roods, 32 perches; and which they declared to be in lieu of the glebe lands, and right of common belonging to the said *Robert Carter*, as rector aforesaid; and also in lieu of an ancient inclosure or piece of glebe land given by him in exchange to *John Richardson*. The commissioners then assigned to the said *Robert Carter*, as rector of *Waddingham-cum-Snitterby*, five several plots or parcels of ground, containing together 223 acres, 1 rood, 31 perches, which (quantity, quality, and situation considered) they adjudged to be in lieu of, and as a full recompence and compensation for all the tithes, dues, duties, and payments belonging to the said *Robert Carter*, as rector aforesaid, within the open fields, common pasture, and carrs in the township of *Snitterby* and *Atterby* aforesaid. The commissioners also assigned unto the said *Robert Carter* and his successors, rectors of *Waddingham-cum-Snitterby*, one plot or parcel of ground, containing 17 acres, 2 roods, statute measure, which (quantity, quality, and situation considered) they adjudged to be equal in value to the tithes of the ancient inclosed lands in *Snitterby*. At the end of the *Snitterby* allotments was a marginal note by the commissioners as follows; viz. “Here end *Snitterby* allotments.” The commissioners then assigned unto the Reverend *George Jolland* and his successors for the time being, rectors of *Atterby* aforesaid, a certain allotment in lieu of glebe; certain allotments, amounting together to 125 acres, 3 roods, 26 perches, statute measure, which (quantity, quality, and situation considered) contained or were equal in value to two full fifteenth parts of the arable fields, common pastures, and carrs in *Atterby* aforesaid, and they adjudged the same to be in lieu of and as a compensation for all the tithes, dues, duties, and payments of the said *G. Jolland* within the said arable fields, common pastures, and carr grounds in the said several townships of *Atterby* and *Snitterby*,
except

except as in the said act is excepted; and also certain allotments in lieu of tithe of old inclosure in *Atterby* and *Snitterby* aforesaid.

The lands allotted in *Snitterby* under this act amounted to 1533 acres, 17 perches; and deducting the allotment for the glebe, 33 acres, 3 roods, 32 perches, there remain 1499 acres, 25 perches; two fifteenths of which would be 199 acres, 3 roods, 32 perches.

The lands allotted as aforesaid to the rector in *Snitterby* amounted to 223 acres, 1 rood, 31 perches, leaving an excess of 23 acres, 2 roods, 9 perches, above the 199 acres, 3 roods, 32 perches.

The lands allotted in the township of *Waddingham* under the act amounted to 1281 acres, 1 rood, 36 perches; and deducting the allotment for glebe and rector's right of common, 51 acres, 1 rood, 30 perches, and for a gravel pit, 1 acre, 2 roods, there remained of lands in that township 1228 acres, 2 roods, 6 perches; two fifteenths of which would be 163 acres, 3 roods, 8 perches.

The lands allotted in the township of *Atterby* under the act amounted to 846 acres, 3 roods, 28 perches; and deducting the allotment for glebe, 13 acres, there remained of lands in that township 833 acres, 3 roods, 28 perches; two fifteenths of which would be 111 acres, 29 perches. The lands allotted to the rector amounted to 125 acres, 3 roods, 26 perches, leaving an excess of 14 acres, 2 roods, 37 perches, beyond the 111 acres, 29 perches.

There were 888 acres, 16 perches, allotted to proprietors of lands in *Waddingham* having no allotments made to them in *Snitterby*.

There was not in the award any order, direction, regulation, or determination of the commissioners, as to the tithes of the lands in the township of *Waddingham* inclosed

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inclosed by virtue of the act or any part thereof, unless any thing above stated amounted thereto.

One of the Plaintiff's witnesses in his cross-examination stated that the land which the rector of *Waddingham-cum-Snitterby* had was of good fair quality, and lay together convenient. He got forty acres of carr land, much better than the uninclosed land which had not been mowed for seven years.

Broderick for the Plaintiff in error. It cannot be disputed that the legislature intended the rector to have an allotment in lieu of his tithes in *Waddingham*; but it must be taken upon this award, that he has received such an allotment, although in express terms lands in *Waddingham* have not been awarded in lieu of the tithes there. By the act the commissioners were empowered to allot such parcels of the arable fields and common pastures of the township of *Snitterby*, and of the township of *Waddingham*, as should (quantity, quality, and situation considered) be equal to two fifteenth parts of the titheable parts of those lands. Now, provided the rector obtained his two fifteenths of both townships, it must have been immaterial to him whether the allotment comprising the two fifteenths were placed in *Snitterby* or in *Waddingham*; and deficiency in quantity may have been compensated for in quality. If that might be legally done, it may be fairly presumed that it was done, for otherwise it is difficult to account for the surplus quantity of 23 acres of land allotted to the rector in *Snitterby*; at all events, the rector having acquiesced in the award for such a length of time, every intendment ought to be made in favour of it. And if he has had any allotment in lieu of the tithes in *Waddingham*, he comes within the exception in the saving clause, and is barred.

Adams

Adams Serjt. for the Defendant in error. The commissioners were bound by the act to allot to the rector of *Waddingham* lands in *Waddingham*, in lieu of his tithes in *Waddingham*. The act directs them to allot to the rector such parcel or parcels of the arable fields, common pastures, and carrs, within the township of *Snitterby*, and also the titheable parts of the township of *Waddingham* so directed to be inclosed, as should (quantity, quality, and situation considered) be equal in value to two full fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of and as a full compensation for all the tithes belonging to the rector, and arising within the *same* lands and grounds. The commissioners were, therefore, to make to the rector such an allotment of the lands in *Snitterby*, and of the titheable parts in the township of *Waddingham*, as should be equal to two fifteenth parts of the titheable parts in *Snitterby*, and to two fifteenth parts of the titheable parts in the township of *Waddingham*. But they have omitted to make any allotment to the rector in lieu of his tithes in the township of *Waddingham*. The allotment of land in lieu of tithes in *Snitterby* and *Atterby* cannot be intended to include a compensation for the tithes in *Waddingham*, for the commissioners had no power under the act of parliament to allot land in *Snitterby* or *Atterby*, as a compensation for the tithes in *Waddingham*. Eight hundred acres having been allotted to persons in *Waddingham*, who have no allotments in *Snitterby*, the rector has received neither tithes nor allotment in respect of their lands. If the allotment in *Snitterby* was to be a compensation for all the tithes, it should have consisted of 364 acres, whereas it consists only of 223 acres; and it is stated that the quality was not superior. Then, assuming that the rector has no allotment in lieu of his tithes in *Waddingham*, his right is not barred by the act of parliament.

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Cur. adv. vult.

BEST C. J. Any compensation for the tithes of *Waddingham*, however inadequate, would extinguish the right of the Defendant in error, because the amount of compensation was to be decided by the commissioners. If the commissioners had erred by giving too little, their errors could only be corrected by an appeal; and the rector for the time being not having appealed to the sessions, his claim, and that of his successor, would have been for ever barred. But the record states, "that there is not in the award any order, direction, regulation, or determination of the commissioners as to the tithes of lands in the township of *Waddingham* inclosed by virtue of the act, or any part thereof, unless any thing above stated amounts thereto." It is clear that nothing previously stated amounts to an award of compensation for any of the tithes of *Waddingham*, for all the allotments are made as compensation for other claims which are stated in the award.

This is an answer to the argument that the com-

(a) 1 *Swanst.* 22.

missioners,

missioners, considering the *situation, quantity, and quality of the land allotted to the rector*, might think his allotment a full compensation for all the rights belonging to his rectory.

We have been asked to presume that the commissioners must have awarded compensation for these tithes, from the length of time that has elapsed during which no tithes have been claimed for the lands in *Waddingham*.

This presumption is repelled by the express terms of the award. It is perfectly clear that if a claim for compensation for the tithes of *Waddingham* was made to the commissioners, such claim was disallowed.

The authority the act gives to the commissioners is to *assign and allot to the rector such parcels of lands as they should consider to be a full satisfaction of his different rights*. All the rights to be compensated are enumerated. The commissioners are not authorized to decide what rights are to be compensated, but only to ascertain the amount of compensation for the rights specified in the act. With regard to the tithes of *Waddingham*, the legislature has not permitted the commissioners to judge what compensation shall be made for them. The statute says the compensation for these tithes shall be two fifteenths of the titheable lands in *Waddingham*, and the commissioners have only to ascertain what, *quality, quantity, and situation* considered, amounts to two fifteenths of the titheable lands in this township.

The commissioners not having made any compensation for the tithes of *Waddingham*, must either have resisted a claim which they were directed to compensate, or from inadvertence have omitted to make compensation for it. Either they have exceeded their authority in the award, or they have omitted to do what they were expressly required to do. In either view of the case their award is void, as to all such interests as are affected by their exceeding their jurisdiction, or by their omission.

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in error is entitled to maintain his action for not setting out the tithes of *Waddingham*, and the judgment of the Court of King's Bench must be affirmed.

Judgment affirmed accordingly.

June 25.

JACOBS, Assignee of LAWTON, a Bankrupt, v.
LATOUR and MESSER.

A party, who having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby, although the goods are sold to him under the execution, and are never removed off his premises.

Quære,
Whether a trainer of race-horses has a lien on the horses for his services in training.

TROVER for the conversion of certain race-horses.

At the trial before *Burrough J.*, last *Hertford* assizes, it appeared that these horses had been placed by *Lawton* with the Defendant *Messer*, a trainer, and were by him kept and trained for running. *Lawton* being indebted to *Messer* for his services in this respect, and for the keep of the horses, and being insolvent, *Messer* obtained a judgment against him, on the 5th of *May* 1827, for 227*l.*, upon which he issued a *f. fa.* on the 16th of the same month, returnable on the 23d. The levy was made on the 16th, and under it the horses in question, which had never been out of his possession, were sold to *Messer* for 156*l.*

On the 22d of *May* 1827 a commission of bankrupt having issued against *Lawton*, upon an act of bankruptcy committed in *February* 1825, the Plaintiff, as his assignee, brought this action to recover the value of the before-mentioned horses.

It was contended, on the part of the Defendants, that if the execution would not avail against the commission of bankrupt, at all events the Defendant *Messer* had a lien for his services in training the horses, which entitled him to keep them till his account was settled: a verdict, however, was found for the Plaintiff, with leave for the Defendants to move to set it aside on this ground, and enter

enter a nonsuit instead. Accordingly *Wilde* Serjt. obtained a rule *nisi* to this effect, citing *Chase v. Westmore.* (a)

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Andrews Serjt. shewed cause. In *Chase v. Westmore* the defendant, a miller, had a lien by the general usage of trade, and it was only decided, that an agreement as to the terms of grinding would not deprive him of that lien. But a mere livery-stable keeper,—and the vocation of a trainer is in effect the same,—has no lien by the usage of trade; such a lien being incompatible with the object for which horses are placed with him, namely, that the owner shall have them in condition to ride when he pleases. In *Chapman v. Allen* (b) it was decided that one who takes in cattle to agist has no lien for the amount of their feed; and in *Jones v. Pearl* (c), that an innkeeper cannot sell a horse for his keep. At all events if the Defendant had a lien, he waived it by taking the horses under an execution.

Wilde. Even admitting that a livery-stable keeper has no lien, it does not follow that a trainer is also deprived of that right. The training is an application of skill by which the value of the animal is increased; and he is not placed in the trainer's hands for the purpose of daily use, but of occasionally running at races: the trainer's claim to lien, therefore, rests upon the same footing as that of any artificer who bestows his labour upon goods; and it was not waived in the present case, because, notwithstanding the execution, the horses were never out of the Defendant's possession.

Cur. adv. vult.

BEST C. J. This was an action of trover against a stable keeper and trainer, to recover the value of

(a) 5 M. & S. 160. (b) *Cra. Car.* 275. (c) 3 Str. 556.

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This presumption is repelled by the express terms of the award. It is perfectly clear that if a claim for compensation for the tithes of *Waddingham* was made to the commissioners, such claim was disallowed.

The authority the act gives to the commissioners is to *assign and allot to the rector such parcels of lands as they should consider to be a full satisfaction of his different rights*. All the rights to be compensated are enumerated. The commissioners are not authorized to decide what rights are to be compensated, but only to ascertain the amount of compensation for the rights specified in the act. With regard to the tithes of *Waddingham*, the legislature has not permitted the commissioners to judge what compensation shall be made for them. The statute says the compensation for these tithes shall be two fifteenths of the titheable lands in *Waddingham*, and the commissioners have only to ascertain what, *quality, quantity, and situation* considered, amounts to two fifteenths of the titheable lands in this township.

The commissioners not having made any compensation for the tithes of *Waddingham*, must either have resisted a claim which they were directed to compensate, or from inadvertence have omitted to make compensation for it. Either they have exceeded their authority in the award, or they have omitted to do what they were expressly required to do. In either view of the case their award is void, as to all such interests as are affected by their exceeding their jurisdiction, or by their omission.

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Cur. adv. vult.

BEST C. J. Any compensation for the tithes of *Waddingham*, however inadequate, would extinguish the right of the Defendant in error, because the amount of compensation was to be decided by the commissioners. If the commissioners had erred by giving too little, their errors could only be corrected by an appeal; and the rector for the time being not having appealed to the sessions, his claim, and that of his successor, would have been for ever barred. But the record states, "that there is not in the award any order, direction, regulation, or determination of the commissioners as to the tithes of lands in the township of *Waddingham* inclosed by virtue of the act, or any part thereof, unless any thing above stated amounts thereto." It is clear that nothing previously stated amounts to an award of compensation for any of the tithes of *Waddingham*, for all the allotments are made as compensation for other claims which are stated in the award.

This is an answer to the argument that the com-

(a) 1 *Swanst.* 22.

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Upon the best consideration I have been able to give this case, I am of opinion this rule ought to be discharged. I do not mean to say, contrary to principles long established, that you can give the contents of a written agreement in evidence without producing the agreement itself. If it were necessary in this case to prove the terms of the holding of the tenant, I should be of opinion the rule should be complied with, and that the tenancy could not be proved by other evidence than by producing the written agreement itself. But it appears to me not to be necessary to prove any item of the agreement. The facts to be made out are simply these : that the Plaintiffs have an interest in the premises, and that the persons named in the declaration are their tenants. Now that fact is capable of proof, and was actually proved without the intervention of any agreement or lease ; without having recourse to any one item in it. And I find, so lately as the year 1827, a case was determined by the Court of King's Bench, which is so like this case, that I cannot make the smallest distinction. Without, therefore, going into all the cases which have been decided, I think it sufficient to go no further than to read an authority that appears to me to be decisive upon this case. It is the case of *The King v. The Inhabitants of the Holy Trinity and St. Margaret, Hull*, which is to be found in 1 *Manning & Ryland's Rep.* 444. (a); and the question was, Whether or not the Plaintiff was entitled to a settlement upon a tenement of 10*l.* a year value. In order to prove that, the appellants were proceeding to shew that the pauper was in the occupation of a tenement of that value : the respondent's counsel thereupon interposed, and asked the pauper whether the contract under which he held the tenement was not in writing ; and upon his answering that it was, they

(a) *S. C.* 7 *B. & C.* 611.

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objected that no parol evidence could be received upon the subject, but that the document itself must be produced, or the loss of it proved. The appellants' counsel, in reply, contended, that they were not examining as to the contents of the document, with which they had nothing to do, but all they proposed to prove, was the fact of the occupation and the rent paid by the occupier; and that they were at liberty to prove so much by the cross-examination of the pauper, without any reference to the agreement. The court of quarter sessions, however, were of opinion that the written agreement ought to be produced, or its absence accounted for; and that neither being done, the parol evidence was not admissible. The evidence consequently was rejected.

Upon a case being granted, the Court of King's Bench after hearing counsel at some length stopped him, and my Brother *Bayley* said, "The appellants did not enquire into the terms or contents of the written agreement. They simply asked a question as to the fact, whether the pauper had or had not been tenant of the premises in a particular parish. Surely in reply to that question the witness ought to be allowed to say, 'I was the tenant of A.'" In giving the judgment of the Court, my Brother *Bayley* says: "The contents of this written agreement could not be proved by parol evidence, and, therefore, it was properly decided in the cases which have been cited, that where such a written agreement was in existence, the terms of the tenancy or amount of the rent could be proved only by the production of the agreement itself. But the rule of law does not go so far as to prevent the admission of parol evidence, of the fact that the relation of landlord and tenant existed between particular parties at a particular time in a particular parish. I think decidedly that proof by parol of the fact of the pauper's having been tenant was receivable, and, therefore, that the sessions were wrong."

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This question was also brought before the Court of King's Bench in *The King v. Inhabitants of Castle Morton* (a), when the Court held the agreement must be produced, and parol evidence could not be given of it. But the plaintiff in that case was not merely to prove there was the relationship of landlord and tenant; he sought to shew by the agreement, which was unstamped, that the premises were of the value of 10*l.* a year, of which he offered no other evidence but the contents of the contract itself. The Court held that he ought to produce the agreement, and that he could not give parol evidence of it. Lord *Tenterden* in giving his judgment, referring to *Dover v. Mestaer* (b), says, "The promissory note was there admitted in evidence, on the ground that the defendant, who had in that case been guilty of a crime, should not be allowed to relieve himself from the consequences of it by such an objection: (that it was unstamped.) And so in the case of forgery, a prisoner cannot object that the forged instrument when produced cannot be given in evidence for want of a proper stamp. But this case is very different; for the parties here seek to shew the value of a tenement by the proof of a contract previously entered into respecting it. The contract was not, therefore, in this case collateral, but of the very essence of the case." To be sure it was, because there the mode resorted to for proving the value was to shew that the pauper had contracted to give so much.

Now in the present case there is not one syllable of proof of what quantity of rent was to be paid. All that it was necessary to prove, was, that the plaintiffs were landlords of the persons named in the declaration, and that they were tenants; and how is that proved? The landlords' right is proved by the best of all possible evi-

(a) 3 B. & A. 588.

(b) 5 Esp. 92.

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dence; they claim under the will of *Mary Strother*, and the will is put in and read, and by the will the Plaintiffs are constituted tenants in common. What is the next fact proved? That the occupiers are tenants to the Plaintiffs of the estate. That I consider would be *prima facie* evidence of a seizin in fee. The witness goes on to say, however, not that he is in possession merely, but "I am in possession as tenant to the two Plaintiffs to whom I pay rent." That is all that it is necessary to enquire. The objection taken at the trial was, that there was no evidence of the value of the reversion, and, therefore, the damages could not be ascertained. If, indeed, the Plaintiffs had gone for damages commensurate to their title, and wanted to prove it, they must have taken some course or other to do it; but the Plaintiffs do not appear to have done that here. Probably if they had gone for damages they must have gone further, and have produced their agreement, that being the only means by which they could shew the extent of their interest. But this is like every other case where no real damages are to be proved. An injury was done, but the Plaintiffs were content to take nominal damages. Now, was it a necessary thing to prove extent of title in this case? I apprehend not, because in the case which will most probably be relied upon as deciding this point, the Court held, that although there was no evidence of damages, the party was entitled to a shilling. I am speaking of the case of *Cotterill v. Hobby*.^(a) It was an action for an injury to a reversion, by cutting down a tree. The first count stated a written agreement; and the Court held there, that it was necessary the written agreement should be produced. And why? Because there the question was, whether the trees had been demised; that could only

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(a) 4 B. & C. 465.

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be ascertained by the agreement itself, and the Court held the agreement should be produced. Now, as there is no question of that sort here, I do not think that case applies to the principle which is to decide this. The Court held there, that the plaintiff was entitled to recover upon his count in trover, the defendants having cut down a tree which was proved to belong to the plaintiff; but whether the plaintiff claimed it as reversioner or as occupier, or by any other title, was not the question in the action, which was trespass on the case; he was clearly entitled to the wood, in whatever character he appeared, whether as reversioner or occupier. The Court held he was entitled to recover the value of the tree, inasmuch as evidence had been given to prove his title to it.

I am of opinion this rule should be discharged.

BURROUGH J. I am very sorry to differ from my Brother *Gaselee*, but I am clearly of opinion the other way, and I will state very shortly why. The application of the rules of evidence depends very much on the nature of each particular action. Here the Plaintiffs have a reversionary interest in lands which are in the possession or occupation of certain persons. But it must be recollected that the Defendants are entire strangers to such interest, as they are not the tenants or occupiers, but mere wrong-doers. I admit that payment of rent is *prima facie* evidence of a reversion in the Plaintiffs; but when one of those witnesses said, he was tenant to the Plaintiffs, and held under an agreement, no parol evidence was receivable, as the agreement itself should have been produced. Whether the Plaintiffs were entitled or not would depend on the construction of that instrument, and when produced, it might shew an interest different from that of a reversionary interest. It is

is impossible to say what the Plaintiffs' interest was, until the instrument was produced. There was no evidence, therefore, to go to the jury of any reversion, and the Plaintiffs failed in the material point. As to the verdict being taken for nominal damages, that proves nothing in my opinion. There was nothing proper to go to the jury, unless the agreement were produced; and I, therefore, should have directed a verdict for the Defendant. It is the common course in trials at *Nisi Prius*, if the term a party holds, is by a contract in writing, to have the contract produced, and no other evidence can be receivable to explain its contents; and here, as the Plaintiffs did not produce the agreement, they made out no case against the Defendants as wrong-doers. The Defendants are mere wrong-doers, and not tenants or occupiers.

On the whole, therefore, it appears to me, that the general rule of evidence, as laid down by the text writers with respect to the admissibility of parol testimony to explain the contents of a written instrument, is particularly applicable to this case. Here the party held by a written agreement, which should have been produced, without which he proved nothing. I am clearly of opinion, that the rule of evidence should have been complied with; and, therefore, that the rule for a new trial must be made absolute.

PARK J. Upon the first question I think that there was sufficient evidence to go to the jury of a tenancy by both the occupiers named in the declaration under both the Plaintiffs.

The main question is, Whether, in order to prove a reversion in the Plaintiffs, it was necessary to give more evidence than was given at the trial? I am of opinion it was not. Let us see what was proved. The Plaintiffs had the property devised to them as tenants in common,

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common, by the will of *Mary Strother*, which was read. It does not state what quantum of estate they had; but in the absence of other proof, the estate being devised to them, and rent being paid to them, it is to be presumed, till the contrary is shewn, to be a tenancy in fee. The tenants could not have the fee, for that would have required a conveyance by deed, whereas this is only said to be an agreement.

But it was said by counsel at the trial, the agreement ought to have been produced, because (amongst other things) the Plaintiffs, without it, could not shew the amount of the damages, for they could not shew the extent of their reversion, upon the duration of which their injury and damage depended. True, this is certainly so; but what is that to the Defendants? The Plaintiffs are the losers by that, and they *have* lost, having only got 1s. damages; and if they had only a week's reversion, they could not have got less. This is all that it is necessary for me to say on this part of the case, and I think I am borne out by authority; and although, no doubt, in this matter, as well as in most others, there is a contrariety of decisions, yet I am a great enemy to vacillations in judgment; and even if there are many cases the other way, yet, finding cases perhaps comparatively modern in support of my present opinion, I think it better to stand upon the later authorities.

The doctrine I wish to be understood as holding is this, that parol evidence of the contents of a written instrument cannot be given where the contract contained in such instrument is the subject of the suit; because the *terms* of the agreement must depend on the written instrument.

Thus, in one of the cases, *Brewer v. Palmer* (a), Lord *Eldon*, then Chief Justice of this Court, where an

(a) 3 *Esp. N. P. C.* 213.

action for the use and occupation of certain premises, which had been demised by an agreement in writing, was brought, nonsuited the plaintiff on the non-production of the writing; and rightly, because the *terms* of the holding must have been proved, and they could be allowed to appear from the written agreement only.

The principle, as far as I have been able to discover it by reference to many cases, is that shortly stated by Lord *Tenterden* in his usual neat and precise manner. "The parties seek to shew the value of a tenement by the proof of a written contract previously entered into respecting it. The contract, therefore, is not *collateral*, but of the very essence of the case, and therefore could not be proved by parol evidence."

That was the opinion he gave in a very short, but very correct, judgment in *The King v. Inhabitants of Castle Morton*. There, a pauper being removed, claimed a settlement by having rented a tenement of 10*l.* a year; and it appeared that the renting was by virtue of a written agreement, which it was necessary in that instance to produce, inasmuch as no other evidence was adduced to shew the value of the premises. The Court held, that the written agreement should have been produced, for there the contract was not collateral, but the very essence of the case. The same rule applies to the case of *Dover v. Mestaer*. (a) But, on the other hand, *Bucher v. Jarrett* (b) seems to me to go the full length of this case. It was an action of trover for the certificate of a ship's registry, and it was held the certificate might be proved by the production of the registry from which it was copied, though no notice had been given to produce the certificate itself. Lord *Alvanley*, Mr. Justice *Heath*, Mr. Justice *Rooke*, and Mr. Justice *Chambre* gave their opinions at full length upon the case; and the judgment

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(a) 5 *Esp.* 92.

(b) 3 *Bos. & Pul.* 143.

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of Mr. Justice *Chambre* in particular states the point most neatly, and carries the principle to the full extent of the present case. He says, "There is an essential difference, as I conceive, between the mode of proving a very general or a very minute description of a written instrument. The rule undoubtedly is, that no evidence can be received of the contents of a written instrument, but the instrument itself. But in this case the Plaintiffs declared in trover for a written instrument, describing it generally, and not referring to its contents, of which evidence could not have been received, as no notice had been given to the Defendant to produce the instrument itself."

There is also the case of *How v. Hall* (a), which was decided upon the same principle as that which I have just mentioned. It was an action of trover for a bond. It was contended the plaintiff might give parol evidence of it to support the general description of the instrument stated in the declaration, it not being necessary in such an action to go into minute particulars of the contract by producing the instrument itself. The Chief Justice, Lord *Ellenborough*, and Mr. Justice *Le Blanc*, after entering fully into the case, held, that in the nature of things, it was not necessary that it should be so: that the case did not require the production of the instrument.

Jolly v. Taylor (b) was an action of *assumpsit* against the proprietor of a stage-coach on a promise to carry three promissory-notes of 5*l.* each from *Ware* to *London*. It was objected by Mr. Serjt. *Best*, that before giving evidence of the contents of the notes the plaintiff must prove a notice to produce them, as promissory-notes, like all written instruments, should speak for themselves, and were not to be described according to the loose recollection of witnesses. But Chief Justice *Mans-*

(a) 14 *East*, 274.(b) 1 *Campb.* 143.

field said, "A notice here appears to me to be unnecessary. I can make no distinction as to this purpose between written instruments and other articles; between trover for a promissory-note and trover for a waggon and horses."


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The case of *Davis v. Reynolds* (a) was an action where *Cowper* and Co. of *London* had bought of *Peacock* and Co., who resided in the North of *England*, certain flax, which had been consigned to *Cowper*, and landed on the defendant's wharf in *London*. *Cowper* and Co. had transmitted to *Peacock* their acceptance for the amount, and had sold the flax to the plaintiff who had paid them the amount, and had taken a receipt. The bill of lading was tendered in evidence, but rejected for want of a stamp. Lord *Ellenborough* said, "The right of possession follows the right of property. When the goods arrived at the wharf they were delivered to the wharfinger, as the bailee, for the benefit of the person entitled. At that time *Cowper* and Co. were entitled, for they had paid their accepted bill for the goods, which does not appear to have been dishonoured; they had thereby acquired a right of property which they were competent to assign."

In *Doe d. Sir Mark Wood v. Morris* (b) it was holden that in ejectment the landlord having proved payment of rent by the defendant, and half a year's notice to quit given to him, cannot be turned round by his witness proving on cross-examination, that an agreement *relative to the land* in question was produced at a former trial between the same parties, and was, on the morning of the then trial, seen in the hands of the plaintiff's attorney, the contents of which the witness did not know; no notice having been given by the defendant to produce that paper; for though it might be *an agreement*

(a) 1 *Stark*. 115.

(b) 12 *East*, 237.

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relative to the land, it might not affect the matter in judgment, nor even have been made between those parties.

In the present case it was not necessary, in order to prove the reversionary interest to be in the Plaintiffs, to produce an agreement with their lessee, when it was clearly proved they, the Plaintiffs, held the premises as tenants in common under the will, which was read. And although the quantum of interest which each had did not appear, still there was *prima facie* evidence of a holding in fee till the contrary was shewn. In *Doe d. Sir M. Wood v. Morris*, Lord *Ellenborough* says, "How can we say that the plaintiff ought to have been nonsuited for want of giving the best evidence of the tenancy, unless it appeared that there was other and better evidence of it in an agreement in writing between the landlord and his tenant, which the landlord kept back? Enough at least ought to appear to shew that the paper not produced was better evidence of the terms of the tenancy than the evidence which was received; but it did not appear that it was an agreement between these parties, or that it was an existing agreement at this time. It might have been an agreement between the defendant and his former landlord, or it might have related to a former period of the tenancy. The witness did not profess to know any thing of the contents of the paper, only that it was an agreement relative to the lands in question. We determined a case of *Doe d. Sherwood v. Pearson* similar to this, in the last term, where the rule for a new trial, which was moved on the same ground, was finally discharged."

In the case of *Stevens v. Pinney (a)*, my learned Brother *Burrough* held, that it was not necessary to produce the written agreement.

(a) 2 *B. Moore*, 349.

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It was an action for work and labour. The plaintiff having proved the value of the work done, and closed his case, one of the defendants' witnesses swore that there was a memorandum in writing, containing an estimate of the prices at which the work was to be performed, and produced a copy in the plaintiff's handwriting unstamped, and not signed either by him or the defendant. The learned Judge who tried the cause held, that the plaintiff was not thereby precluded from recovering on the common counts. I do not think that will apply to the present case. The case afterwards came before the Court, when the ruling of my learned Brother was confirmed, and the Court certainly relied very much on the case of *Doe d. Sir M. Wood*, and the case there mentioned of *Shearwood v. Pearson*, as supporting that opinion.

The remaining case to be mentioned is *The King v. The Inhabitants of the Holy Trinity, Hull*; and it does seem to me to be quite impossible to distinguish the reasoning of the judgment in that case from the present. If that case be law, and if it be a decision of a competent jurisdiction, I do not think it is necessary now to go back to more remote decisions on any special deviation from the old rule. My learned Brother *Bayley*, in giving judgment in that case, says "the contents of this written agreement undoubtedly could not be proved by parol, and, therefore, it was properly held in the cases which have been cited, that where such written agreement was in existence, the terms of the tenancy or the amount of the rent could be proved only by the production of the agreement itself. But the rule of law does not go so far as to prevent the admission of parol evidence of the fact, that the relation of landlord and tenant existed between particular parties at a particular time, in a particular parish; I think de-

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cidedly, that proof by parol of the fact of the pauper's having been tenant was receivable, and, therefore, that the sessions were wrong." The other Judges concurred with the judgment delivered by the learned Judge. That case I cannot distinguish from the present. There is a discrepancy between the cases on this subject, which is much to be lamented. I have only to say, that the case of *The King v. The Inhabitants of the Holy Trinity, Hull*, is certainly much posterior in point of date to that of *Cotterill v. Hobby*.

The main case, however, upon the subject, and to which I pay the most unfeigned respect, is the case of *Doe d. Shearwood v. Pearson*. (a) The objection arose upon the notice to quit. The son of the lessor of the plaintiff proved that he had received rent of the defendant for his mother, and the time of these receipts agreed with the time for which the notice to quit was given; but he also spoke of the time for quitting from a written agreement entered into at the time of the taking between his mother and the defendant, which he said he had lately seen in the possession of his mother, whereupon the objection arose that the agreement ought to have been produced, which was overruled by Mr. Justice *Chambre* at the trial at *York*, and on its afterwards coming before the Court to set aside his opinion, the rule was finally discharged. Now, where such a man as Mr. Justice *Chambre*, whose knowledge in his profession was so considerable, whose clearness of head and accuracy of understanding were well appreciated by all his contemporaries, held this opinion, and when that opinion was confirmed by Lord *Ellenborough*, Mr. Justice *Grose*, that able and consummate lawyer, Mr. Justice *Le Blanc*, and Mr. Justice *Bayley*—greatly as I lament that I differ in opinion from my Lord Chief

(a) 12 *East*, 239.

Justice, and my Brother *Burrough*, whose opinion I also greatly and highly value — if I err, I err with those respecting whom and whose authority no Judge has occasion to be ashamed. I therefore am of opinion with my Brother *Gaselee*, that the rule ought to be discharged.

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BEST C. J. Since this case was argued at the bar, it has occupied a great deal of my attention, and I have anxiously endeavoured to reconcile my opinion with that of my two learned Brothers, from whom I have the misfortune to differ. But I have not been able to do so.

I seldom pass a day in a *Nisi Prius* court without wishing that there had been some written statement, evidentiary of the matters in dispute. More actions have arisen perhaps from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule that in all cases the best evidence that could be had should be produced; and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that if produced it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing no parol testimony can be received of its contents, unless the instrument be proved to have been lost. It is assumed the case before us is not within this rule, and that the Plaintiffs did not give parol evidence of the contents of the lease of the premises, for the injury for which this action was brought.

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This will be found to be a mistake; for the declaration states that the Plaintiffs had let these premises to certain tenants, and that the conduct of the Defendants is injurious to the reversion which the Plaintiffs have in them. This statement must be proved; and is not the lease, which states all the circumstances of the tenancy, the best evidence of them?

If there had been no contract in writing, the testimony of the tenants that they occupied the premises injured by the Defendants, and that they paid the Plaintiffs rent for these premises, would have proved the declaration; such testimony would in that case have established the relationship of landlord and tenant, and have shewn that the Plaintiffs must have had a reversion at the expiration of the regular notice to quit, or, at the furthest, at the expiration of three years; that being the longest period for which a parol lease could, by the Statute of Frauds, be granted. But as there was a lease or agreement in writing, that lease or agreement was better evidence of the relationship of landlord and tenant than any parol evidence that could be adduced.

This lease or agreement gave a description of the premises demised, and stated the names of the tenants to whom they had been leased, the persons by whom, and the term for which they were demised.

These parts of the contract could be seen by its production only, and, therefore, the contract was the best, and, I think, the only evidence that could be received. But there is one fact that cannot be inferred from the facts proved in the case, and can only be obtained from the production of the lease or contract; namely, the duration of the term. It has been said at the bar, that the Plaintiffs were content to take nominal damages, and it was not material to shew when the estate which was injured was to return into their possession.


session. But it does not appear from the evidence, that they had any reversion. This estate might be granted for one thousand years; might be the assignment of a term with a covenant by the assignee to pay rent. If the Plaintiffs would have no reversion for a thousand years, I doubt whether they would have such an interest as to maintain an action for an injury to so remote a reversion. To support an action of this sort, there must be some damage, and it is impossible to prove any damage in the case I have stated. The objection, however, on which I rest my opinion is this, that matters which are stated in the lease, have been proved by parol testimony.

It cannot be denied that the lease must have been produced to prove the amount of rent, if it were necessary to ascertain it.

The lease also states the landlord's and tenants' names, and describes the premises, and the term. If the lease must be produced to prove the rent, it must, for the same reasons, be produced to prove these other facts.

Lord *Mansfield*, speaking many years ago against subtilties and refinements being introduced into our law, said they were encroachments upon common sense, and mankind would not fail to regret them. It is time, he says, these should be got rid of: no additions should be made to them: our jurisprudence should be bottomed on plain broad principles, such as, not only Judges can without difficulty apply to the cases that occur, but as those whose rights are to be decided upon by them can understand. If our rules are to be encumbered with all the exceptions which ingenious minds can imagine, there is no certain principle to direct us, and it were better to apply the principles of justice to every case, and not to proceed to more fixed rules.

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If plain intelligible rules are more necessary in one part of our law than another, the necessity exists most strongly in the law of evidence. The law of evidence is the same in actions for injuries to the reversion as in high treason; and one of the most learned writers upon the spirit of the laws of *England* has said, that uncertainty in the law of high treason would prevent any state from being free. This was the opinion of our ancestors, who, in *Edward* the Third's time, crushed, by one statute, all the subtilties and uncertainties that had been introduced into our laws. The relaxing the rules of evidence is more dangerous in the administration of justice, than all the constructive treasons that ever were invented. Suppose it to be proved, under an indictment for treason, that arms and treasonable papers are found in a house. To prove that that house was in the occupation of one of the prisoners, the landlord is called, who says that the prisoner took the house of him, and paid him rent; upon this the witness is asked, if he did not let his house by a lease in writing, and he answers in the affirmative; and suppose an objection is made for the prisoner that the written instrument is the best evidence to shew who was the tenant of the house; the judge answers, if you wish to prove the contents of the lease, you must produce it, but the prosecutors only want to shew that the prisoner was tenant, and although the lease would certainly shew that, yet the tenancy of the prisoner may be proved by the payment of rent. A gunsmith from *Birmingham* proves the prisoner was the person who bought the arms of him, and that he sent them to his house, and that a person who appeared to be the tenant of the house, and resembled the prisoner, paid for them. He is asked if the order for the arms was not in writing, and if he ever saw the prisoner before, unless the person who paid for the

the


the arms was the prisoner: he is asked whether the prisoner was the person who paid for the arms; but he cannot swear to his identity. Then an objection is made, that the order should be produced, and proved to be in the hand-writing of the prisoner. The judge says, as he must do, these arms are sent to a house of which the prisoner is tenant; they are proved to be paid for at the time by a person who appeared to be the occupier, and who resembles the man at the bar: the judge adds, that this is evidence from which the jury may infer that the prisoner was the person who bought the arms. The prisoner is convicted; and on further enquiry the lease and letter to the *Birmingham* manufacturer are produced, and it appears by the lease, that the house was let to the prisoner's brother, who strongly resembled the prisoner, and the letter to the *Birmingham* manufacturer of arms is written by that brother in his own name, and not in the name of the prisoner. Would any judge venture to advise the King to execute a prisoner under such circumstances? The government are placed in this dilemma by receiving evidence like that on which the Plaintiffs' case rests. Notwithstanding the difference that there is between the importance of the enquiry in the criminal and the civil courts, the rules of evidence are the same in both. I should not hesitate on principle alone, unsupported by any previous determination, to say that you cannot prove any of the contents of a lease or contract, but by the lease or contract: the contract must be shewn.

The rule of law relative to the proof of the contents of written instruments is laid down with great clearness by Lord *Tenterden* in the House of Lords, in the Queen's case (a): "The contents of every written paper are, according to the ordinary and well-established rules

(a) 2 B. & B. 286.

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of evidence, to be proved by the paper itself, and that alone, if the paper be in existence." Let us see how this principle has been acted upon in the cases which have come before the Court. In *Hodges v. Drakeford* (a) it was proved by a witness that the defendant had advertised his shop to be let, and that the advertisement stated that the consumption of the shop amounted to fifteen sacks of flour per week: some witness proved that the defendant said that the shop did business to the extent stated in the advertisement, and that there was an agreement in writing. The Court held, that as the agreement on which the action was brought was in writing, the plaintiff could not make out his case without producing that agreement. *Brewer v. Palmer* is but a *Nisi Prius* case; but it was decided by one of the most eminent Judges that ever sat in *Westminster Hall*, and is quoted with approbation by every writer on the law of evidence. It was confirmed afterwards in *banco*, and has been subsequently acted upon. That was an action for use and occupation; there was an unstamped agreement in writing, and the plaintiff's counsel contended that he ought to be at liberty to go into evidence of the use and occupation. Lord *Eldon* held, that the plaintiffs were bound, if there was a lease, to produce it in evidence, as it might contain clauses which would prevent the plaintiff from recovering, and that therefore it ought to be produced. So in the present case, the contract, if produced, might have shewn that the Plaintiffs had no right to recover in this action. The case of *Brewer v. Palmer* is confirmed by the case of *Ramsbottom v. Turner* (b), and has always been acted on. In *Doe d. Sir Mark Wood v. Morris* the landlord having proved payment of rent by the defendant, and half a year's notice to quit, a witness said there had

(a) 1 N. R. 271.

(b) 2 M. & S. 434.

been

been an agreement in writing relating to these lands, but not to the existing tenancy between the plaintiff and the defendant; and a verdict was given for the lessor of the plaintiff. Upon a motion to set it aside, Lord *Ellenborough*, in giving judgment, makes use of these words: "How can we say that the plaintiff ought to have been nonsuited for want of giving the best evidence of the tenancy, unless it appeared there was other and better evidence of it in an agreement?" Lord *Ellenborough* in that case recognizes the principle that the best evidence of a tenancy is the agreement; but in that case there was no proof, as there is in this, that there was any agreement applicable to the existing tenancy. If Lord *Ellenborough* and the Court of King's Bench had been called on to decide this case, instead of the one which was before them, in which it did not appear that the agreement related to the existing tenancy, they must, to have been consistent, have decided that in this case the agreement relating to the existing tenancy ought to be produced.

The case of *Cotterill v. Hobby*, is in my opinion also decisive on the point. The declaration stated, that at the time of the grievance complained of, a certain close, situate, &c. was in the possession and occupation of one *H. C. Morgan* as tenant thereof to the Plaintiff. It was an action for an injury to the reversion, the Defendant having cut down a quantity of branches from certain trees then standing and growing in and upon the said close. There was a second count in trover for the timber. Plea, the general issue. At the trial before *Garrow B.*, *Morgan* was called as a witness for the Plaintiff, and proved that he was tenant to the Plaintiff of the close in question under a written agreement: that Defendants lopped some branches off the trees growing there, and carried them away. No evidence of the value

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value was given. For the Defendant, it was objected, that the agreement under which *Morgan* held should have been produced, for that it could not otherwise appear that the Plaintiff was reversioner of the trees. My Brother *Bayley* in giving the judgment of the Court says, "It having been shewn that *Morgan* held under a written agreement, I am of opinion that the terms of holding could only be proved by that instrument, and, consequently, that the verdict on the first count cannot be sustained." I cannot distinguish that case from the present. It appears to me that case is supported by principle; it is supported by a variety of previous authorities which can be traced back to remote periods. There is a series of decisions, one following the other, each agreeing with the other, all recognizing the general rule upon which I put this case; but unfortunately they are inconsistent with the one I am now coming to, which was decided by my Brother *Bayley*, and is at variance with his other decision. The last case upon the subject is *The King v. The Inhabitants of the Holy Trinity, Hull*, which was decided by the three Judges of the King's Bench, and they held that parol evidence of a pauper having been tenant was admissible, although the pauper held under a written agreement. There is a variance between this case and the last preceding case, where it was decided by the same Court, that parol evidence of a tenancy was not admissible if a written agreement existed. During the argument, Mr. Justice *Bayley* is reported to have said, the appellants did not enquire into the terms of the contract or written agreement, but whether the pauper had or had not been tenant of the premises. Surely this was enquiring into the contents of the written agreement, which ought to have been produced, as it would describe the tenancy between the parties, and the premises in respect of which

which they were enquiring. The same learned Judge says, "the terms of the tenancy and the amount of the rent could only be proved by the production of the agreement. But the rule of law does not go so far as to prevent the admission of parol evidence of the fact, that the relation of landlord and tenant existed between particular parties at a particular time, in a particular parish." The learned Judge admits, that you cannot prove the amount of rent by parol evidence; that the agreement is the best evidence of this. Is it not equally the best evidence of who were the parties to it, and for what time the relation of landlord and tenant continued? These are the contents of the agreement, as much as the amount of rent. There is more probability of mistake in the statement of these facts than in the statement of the amount of rent. These are complicated facts, as to which the most accurate witness may be mistaken; as to the amount of rent, he cannot mistake if he pays it often. Parol evidence of the amount of rent, therefore, is excluded, not because amount is difficult of proof, but because parol evidence is not the best proof. It is equally not the best proof of every other fact stated in the contract. I cannot agree to a decision, much as I respect the learned Judges who decided it, which is at variance with the case before decided by the same Judges; in which distinctions are made between things which admit of no real distinction; which is inconsistent with every other case in the books; and tends to fritter away a rule of evidence essential to the security of property, of character, and of life. The learned Judge who tried this case must have doubted the propriety of the decision in *The King v. The Inhabitants of the Holy Trinity, Hull*, or he would not have reserved this point; for it is not the practice of Judges where a question has been decided,

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decided, and they subscribe to the doctrine of the decision, to reserve the point for the opinion of the Court. I think the rule for a nonsuit should be made absolute; but two learned Judges differing from the others, and the Court being equally divided, this rule falls to the ground.

June 25.

MARTIN, Demandant; BAXTER, Tenant;
GRUBB and Wife, Vouchees.

1. In taxing the costs upon a mortgage transaction, the mortgagee is not allowed the expense of a declaration of trust from him to a *cestui que* trust who lends the money.

2. The assignment of a mortgage must have an *ad valorem* stamp, if it be accompanied with any new security, or any additional sum be advanced.

IN this recovery which had been suffered for the purpose of perfecting a mortgage security, the mortgagor having disputed his attorney's bill of costs, the prothonotary, upon taxation, allowed 6*l.* 6*s.* 8*d.* for the expence of a declaration of trust from the mortgagees to a *cestuique trust*, whose money they were lending to the mortgagor. This *cestuique trust* was the attorney who had negotiated the business, and whose bill was now disputed.


The sum advanced to the mortgagor was 2,934*l.*, secured by a deed of assignment of mortgage for 2000*l.* from Miss *Eborall* to the mortgagees above mentioned, and by a deed which was in part an additional security for this 2000*l.*, charging real estates of the mortgagor, other than those comprised in the deed of assignment, with the payment to the above-mentioned mortgagees of the sum which they had advanced to pay off the 2000*l.*

The assignment was charged with an *ad valorem* stamp duty of 6*l.*, and the other deed with a duty of 2*l.*, which charges the prothonotary allowed.

The attorney's bill containing these items had been submitted to a professional person on the part of the mort-

mortgagor, but no objection had been made to them till the parties appeared before the prothonotary.

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Jones Serjt. obtained a rule *nisi* for the prothonotary to review his taxation, on the ground that these charges ought not to have been allowed. The declaration of trust was no part of the mortgagee's security, but a mere matter of convenience to the *cestui que* trust, and the mortgagor ought not to pay for any deed that was not essential to the security of the mortgagee.

The assignment of Miss *Eborall's* mortgage, being only an additional security to the present mortgagee, ought not to have had an *ad valorem* stamp, the 55 G. 3. c. 184, and 3 G. 4. c. 117. having exempted from such duty all additional securities given by the same mortgagor.

Storks Serjt., who shewed cause, argued that the *cestui que* trust was the real lender of the money, and the declaration of trust being essential to his security, ought to be paid for by the mortgagor. It had been the constant practice that he should do so.

With regard to the stamp. Although the 3 G. 4. c. 117. had repealed the *ad valorem* duties imposed on the transfer or reconveyance of any mortgage, it had not repealed the duties imposed on any deed operating as an additional security for the sum advanced; still less, if it contained security for any additional sum, or a contract between new parties.

Wilde and *Jones Serjts.* having been heard in support of the rule;

BEST C. J. said, that the mortgagor ought only to pay for such deeds as were necessary for the security of the mortgagee, and that, therefore, the charge for the

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declaration of trust ought to be disallowed. The propriety of the charge for the stamp depended on the construction of two sections of the 3 G. 4. c. 117. That act, which was passed to relieve borrowers of money from the burthen of stamps, had enacted, s. 2. that "upon any transfer, assignment, disposition, assignation, or reconveyance of any mortgage, or of any other security in the said acts, and the schedules thereto annexed, in that respect severally mentioned, or of the benefit thereof, or of the money or stock thereby secured, *provided no further sum of money or stock be added to the principal money or stock already secured*, there shall be paid in *Great Britain* a stamp-duty of one pound fifteen shillings." Under this proviso, the additional 934*l.*, which had been advanced to the mortgagor, took the case out of the operation of the statute; and the third section (by which it was enacted, that "where any deed is made as an additional or further security for any sum or sums, previously secured by any bond on which the *ad valorem* duty shall have been paid, such deed shall be charged only with the ordinary duty payable on deeds in general,") only applied to further securities between the same parties for the same sum.

GASELEE J. thought that the charge for the declaration of trust ought not to be allowed; but begged to be understood as giving no opinion on the question about the stamp.

Rule absolute on the first point only.

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(HOUSE OF LORDS.)

Sir ROBERT GIFFORD, - Appellant;

July 15.

The Right Honourable Lord } Respondent. (a)
YARBOROUGH, - - - }

BEST C. J. My Lords, the question which your Lordships have proposed for the opinion of the Judges is as follows: — “*A.* is seised in his demesne as of fee of the manor of *N.*, and of the demesne lands thereof, which said demesne lands were formerly bounded on one side by the sea. A certain piece of land, consisting of about 450 acres, by the slow, gradual, and imperceptible projection, alluvion subsidence, and accretion of ooze, soil, sand, and matter slowly, gradually, and imperceptibly, and by imperceptible increase in long time cast up, deposited, and settled by and from flux and reflux of the tide, and waves of the sea in, upon, and against the outside and extremity of the said demesne lands hath been formed, and hath settled, grown, and accrued upon, and against, and unto the said demesne lands. Does such piece of land so formed, settled, grown, and accrued as aforesaid, belong to the Crown or to *A.*, the owner of the said demesne lands? There is no local custom on the subject.”

Land, not suddenly derelict, but formed by alluvion of the sea, imperceptible in progress, belongs to the owner of the adjoining demesne lands, and not to the crown.

The Judges have desired me to say to your Lordships that land gradually and imperceptibly added to the demesne lands of a manor, as stated in the introduction to your Lordships' question, does not belong to the crown, but to the owner of the demesne land.

(a) The facts and arguments the Court of King's Bench, are in this case, and the decision of 3 B. & C. 91.

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All the writers on the law of *England* agree in this: that as the King is lord of the sea that flows around our coasts, and also owner of all the land to which no individual has acquired a right by occupation and improvement, the soil that was once covered by the sea belongs to him.

But this right of the sovereign might, in particular places, or, under circumstances, in all places near the sea, be transferred to certain of his subjects by law. A law giving such rights may be presumed from either a local or general custom, such custom being reasonable, and proved to have existed from time immemorial. Such as claim under the former must plead it, and establish their pleas by proof of the existence of such a custom from time immemorial.

General customs were in ancient times stated in the pleadings of those who claimed under them: as the custom of merchants, the customs of the realm with reference to innkeepers and carriers, and others of the same description. But it has not been usual for a long time to allude to such customs in the pleadings, because no proof is required of their existence; they are considered as adopted into the common law, and as such are recognized by the Judges without any evidence. These are called customs, because they only apply to particular descriptions of persons, and do not affect all the subjects of the realm; but if they govern all persons belonging to the classes to which they relate, they are to be considered as public laws; as an act of parliament applicable to all merchants, or to the whole body of the clergy, is to be regarded by the Judges as a public act.

If there is a custom regulating the right of the owners of all lands bordering on the sea, it is so general a custom as need not be set out in the pleadings, or proved by evidence, but will be taken notice of by the Judges as part of the common law. We think there is a custom by which lands from which the sea is gradually and imperceptibly

perceptibly removed by the alluvion of soil, becomes the property of the person to whose land it is attached, although it has been the *fundus maris*, and as such the property of the King. Such a custom is reasonable as regards the rights of the King, and the subjects claiming under it; beneficial to the public; and its existence is established by satisfactory legal evidence.

There is a great difference between land formed by alluvion, and derelict land. Land formed by alluvion must become useful soil by degrees too slow to be perceived: little of what is deposited by one tide will be so permanent as not to be removed by the next. An embankment of a sufficient consistency and height to keep out the sea must be formed imperceptibly. But the sea frequently retires suddenly, and leaves a large space of land uncovered.

When the authorities relative to these subjects are considered, this difference will be found to make a material distinction in the law that applies to derelict lands, and to such as are formed by alluvion. Unless trodden by cattle, many years must pass away before lands formed by alluvion would be hard enough or sufficiently wide to be used beneficially by any one but the owner of the lands adjoining. As soon as alluvion lands rise above the water, the cattle from the adjoining lands will give them consistency by treading on them; and prepare them for grass or agriculture by the manure which they will drop on them. When they are but a yard wide the owner of the adjoining lands may render them productive. Thus lands which are of no use to the King will be useful to the owner of the adjoining lands, and he will acquire a title to them on the same principle that all titles to lands have been acquired by individuals, viz. by occupation and improvement.

Locke in a passage in his *Treatise on Government*, in which he describes the grounds of the exclusive right of property,

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property, says: "God and man's reason commanded him to subdue the earth; that is, improve it for the benefit of life, and therein lay out something upon it that was his own, his labour. He that in obedience to that command subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property which another had no title to, nor could without injury take from him."

This passage proves the reasonableness of the custom that assigns lands gained by alluvion to the owner of the lands adjoining.

The reasonableness is further proved by this, that the land so gained is a compensation for the expense of embankment, and for losses which frequently happen from inundation to the owners of lands near the sea.

This custom is beneficial to the public. Much land which would remain for years, perhaps for ever, barren, is in consequence of this custom rendered productive as soon as it is formed. Although the sea is gradually and imperceptibly forced back, the land formed by alluvion will become of a size proper for cultivation and use; but in the mean time the owner of the adjoining lands will have acquired a title to it by improving it.

The original deposit constitutes not a tenth part of its value, the other nine tenths are created by the labour of the person who has occupied it; and, in the words of *Locke*, the fruits of his labour cannot, without injury, be taken from him.

The existence of this custom is established by legal evidence. In *Bracton*, book 2. cap. 2., there is this passage: "Item, quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Est autem alluvio latens incrementum; et per alluvionem adjeci dicitur quod ita paulatim adjecitur quod intelligere non possis quo momento temporis adjiciatur. Si autem non sit latens incrementum, contrarium erit."

In

In a treatise which is published as the work of Lord *Hale*, treating of this passage, it is said: "that *Bracton* follows in this the civil law writers; and yet even according to this the common law doth regularly hold between parties. But it is doubtful in case of an arm of the sea." (a) It is true that *Bracton* follows the civil law, for the passage above quoted is to be found in the same words in the *Institute*, lib. 2. tit. 1. s. 20. But *Bracton*, by inserting this passage in his book on the laws and customs of *England*, presents it to us as part of those laws and customs. Lord *Hale* admits that it is the law of *England* in cases between subject and subject; and it would be difficult to find a reason why the same question between the crown and a subject should not be decided by the same rule. *Bracton* wrote on the law of *England*, and the situation which he filled, namely, that of Chief Justice in the reign of *Henry* the Third, gives great authority to his writings. Lord *Hale* in his *History of the Common Law* (cap. 7.), says, that it was much improved in the time of *Bracton*. This improvement was made by incorporating much of the civil law with the common law.

We know that many of the maxims of the common law are borrowed from the civil law, and are still quoted in the language of the civil law. Notwithstanding the clamour raised by our ancestors for the restoration of the laws of *Edward* the Confessor, I believe that these and all the *Norman* customs which followed would not have been sufficient to form a system of law sufficient for the state of society in the times of *Henry* the Third. Both courts of justice and law writers were obliged to adopt such of the rules of the digest as were not inconsistent with our principles of jurisprudence. Wherever *Bracton* got his law from, Lord Chief Baron

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(a) *Hale de jure Maris*, p. 28.

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Parker, in *Fortescue* 408., says, "as to the authority of *Bracton*, to be sure many things are now altered, but there is no colour to say it was not law at that time. There are many things that have never been altered, and are now law." The laws must change with the state of things to which they relate; but, according to Chief Baron *Parker*, the rules to be found in *Bracton* are good now in all cases to which those rules are applicable. But the authority of *Bracton* has been confirmed by modern writers, and by all the decided cases that are to be found in the books. The same doctrine that *Bracton* lays down is to be found in 2 *Roll's Abr.* 170.; in *Com. Dig.* tit. *Prerogative*, (D.61.); in *Callis*, (*Broderip's* edition,) p. 51.; and in 2 *Blac. Com.* 261.

In the case of the *Abbot of Peterborough*, *Hale de jure Maris*, p. 29., it was holden: "quod, secundum consuetudinem patriæ, domini maneriorum prope mare adjacentium, habebunt marettum et sabulonem per fluxus et refluxus maris per temporis incrementum ad terras suas costeræ maris adjacentes projecta." In the treatise of Lord *Hale* it is said, "here is custom laid, and he relies not barely on the case without it." But it is a general, and not a local custom, applicable to all lands near the sea, and not to lands within any particular district. The pleadings do not state the lands to be within any district, and such a statement would have been necessary if the custom pleaded were local. The *consuetudo patriæ* means the custom of all parts of the country to which it can be applied; that is, in the present case, all such parts as adjoin the sea.

The case of *The King v. Oldsteorth* (a) confirms that of the *Abbot of Peterborough* as to the right of the owner of the adjoining lands to such lands as were "secundum majus et minus propè tenementa sua projecta." (b)

(a) *Hale de jure Maris*, p. 14.

(b) *Id.* p. 29.

That

That case was decided against the owner, because he also claimed derelict lands against the crown.

Here it will be observed that there is a distinction made between lands derelict and lands formed by alluvion: which distinction, I think, is founded on the principle that I have ventured to lay down, namely, that alluvion must be gradual and imperceptible but the dereliction of land by the sea is frequently sudden, leaving at once large tracts of its bottom uncovered, dry, and fit for the ordinary purposes for which land is used. But still what was decided in this case is directly applicable to the question proposed to us. The Judges are, therefore, warranted by justice, by public policy, by the opinions of learned writers, and the authority of decided cases, in giving to your Lordships' question the answer which they have directed me to give.

My Lords, the answer to your Lordships' question is the unanimous opinion of all the Judges who heard the arguments at your Lordships' bar. For the reasons given in support of that opinion I alone am responsible. Most of my learned Brothers were obliged to leave town for their respective circuits before I could write what I have now read to your Lordships. I should have spared your Lordships some trouble if I had had time to compress my thoughts; but I am now in the midst of a very heavy *Nisi Prius* sittings, and am obliged to take from the hours necessary for repose the time that I have employed in preparing this opinion. If it wants that clearness of expression which is proper for an opinion to be delivered by a Judge to this House, I hope that your Lordships will consider what I have stated as a sufficient apology for this defect.

The LORD CHANCELLOR. My Lords, I beg to express my thanks to the learned Chief Justice, and to the Judges, for the attention they have paid to this subject;

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and I have only to add that I entirely concur in the conclusion at which they have arrived; and I would recommend to your Lordships, as a necessary consequence of the opinion which has been expressed, that the judgment of the Court of King's Bench upon the matter should be affirmed.

EARL OF ELDON. My Lords, I heard only part of the argument, and therefore I have some difficulty in stating my opinion in this case; but having had my attention called to subjects of the same nature on former occasions, it does appear to me, I confess, after reading the finding of the jury, that the opinion of the Judges must be that which the learned Chief Justice has now expressed. I therefore concur in the opinion the Lord Chief Justice has expressed.

Judgment affirmed.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

1828.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

In the Ninth Year of the Reign of GEORGE IV.

GULLY and Others *v.* Bishop of EXETER and
DOWLING.

Nov. 8.

UPON the trial of this *quare impedit*, (the pleadings in which see *ante*, vol. iv. 525. and vol. v. 42.) the Defendant, who claimed through his mother, proposed to call as a witness his father, *John Dowling*, who was tenant by the curtesy of his mother's property. The witness, however, was excluded by *Park J.*, who tried within six months, a party who may present, if the bishop omits to do so, is not a competent witness for one who claims in the same right as such party.

1. Where a bishop has omitted to present to a living lapsed to him for want of presentation within six

2. A conveyance of a fourth part of an advowson in 1672, is not to be deemed voluntary, because the only pecuniary consideration expressed in the deed is twenty shillings.

3. An answer in Chancery, touching an advowson, filed by one who had been seised of the advowson, twenty years after he had conveyed it away, Held, not admissible in evidence against a party who claimed the advowson through him.

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the cause, on the ground that he had an immediate interest in its result.

The Plaintiff also offered in evidence, among other things, an answer in Chancery by *R. Isaac*, who in 1672 had conveyed the property in the advowson to *Lewis Stevings*, under whom the Plaintiff claimed. This answer had been put in, to a bill filed twenty years after that conveyance, and it did not appear whether *Stevings* was alive at the time of the answer; it was, therefore, rejected as inadmissible.

The Defendant's main ground of objection to the Plaintiff's title was, that the conveyance of the advowson from *R. Isaac* in 1672 was voluntary and invalid for want of consideration, the consideration expressed in the deed being, "twenty shillings, faithful service, and other considerations."

It was left generally to the jury to decide on the nature of that transaction, as, whether it were fraudulent or not, and a verdict was found for the Plaintiff at the last *Exeter* assizes.

Merewether Serjt. now moved to set aside this verdict, on the ground that evidence had been improperly excluded, and that the jury had not been specifically directed to consider whether the conveyance of *R. Isaac* in 1672 was without consideration.

John Dowling, he contended, was not interested, because, more than six months having elapsed since the vacancy, he could not sue in *quare impedit*, his right to present having lapsed: and the record in this case would never have been evidence against him.

With regard to the answer in Chancery, although filed after *Isaac* had parted with the property to which it related, yet as an admission by one who was probably responsible under his covenant for title, it ought to have been received in evidence.

Then, as to the deed of 1672, the substance of the
Defendant's

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Defendant's case was, not that there had been moral fraud in the transaction, but that the deed being without consideration, was legally fraudulent as against subsequent purchasers. [*Park J.* In *Doe dem. Watson v. Routledge* (a), Lord *Mansfield* said, that fraud must be proved to render a voluntary settlement void.] But in *Doe dem. Otley v. Manning* (b), a voluntary deed was holden void as against subsequent purchasers for a good consideration; and *Comyn* lays it down, that a bargain and sale for *divers causes and considerations*, without money, is not good, nor in consideration of a marriage before had, or service done. *Com. Dig. Bargain and Sale* (B. 11.)

The time that had elapsed would not operate in support of the deed, because the parties having but a fourth turn, could scarcely be called on to present more than once in a century.

The jury, therefore, ought to have been directed to consider whether the deed was granted on a good consideration or not.

Merewether also moved to arrest the judgment, on the ground that the declaration alleged *R. Isaac*, under whom the Plaintiff claimed, to have been seised of and to have granted the fourth part or purparty of the advowson, without alleging that there had been a previous partition by the coparceners, under one of whom he took the purparty, and that without actual partition he could not be said to be seised of a purparty; he was seised of the whole jointly with the other parceners. 2 *Inst.* 365.

BEST C. J. The witness *Dowling* was properly rejected, as he had a direct interest in the result of the cause, being tenant by the curtesy of the property in respect of which the Defendant made his claim. It is not necessary, therefore, to enter into the question, whether the record in this cause would have been evi-

(a) *Cowp.* 705.(b) 9 *E. R.* 59.

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dence for or against him; for supposing the Plaintiff had failed, what was to prevent the witness from presenting to the very living in dispute? Not the lapse of six months, for the bishop had not presented; and if the bishop had not presented, there was nothing to prevent the witness from presenting before the bishop. He had, therefore, a direct interest in the result of the cause, and was properly excluded.

With regard to the deed of 1672, if the Defendant had established that it was purely voluntary and without consideration, it would no doubt, according to the principle established in *Doe d. Otley v. Manning*, have been void as against a subsequent deed made on good consideration: but there is no evidence that the Defendant succeeded in establishing that point; and, on the contrary, the deed on the face of it is not destitute of adequate pecuniary consideration. If the sum named had been clearly nominal, as the five shillings or ten shillings now usually alleged for form to have been paid by trustees or the like, it might not have been adequate; but who can say, when the value of money has so much decreased, that twenty shillings was not, 150 years ago, the full value of a share in an advowson, which the purchaser might never live to have benefit of? As to the "faithful service and other considerations," though perhaps the expression was only inserted by the conveyancer as ornamental, yet there is no proof that they did not exist; and it is only under a *semble* that *Comyn* lays it down that such service is not a sufficient consideration; he seems, too, to allude to gratuitous services, such as are not the subject of legal obligation. But there is nothing here to shew that the services in question were of such a nature; and at this distance of time it may be presumed they were valuable services, to be rendered for an equivalent, and that this advowson was the equivalent agreed on. The deed, therefore, is valid on the face of it, and must prevail against a subsequent purchaser.

The

The seisin of *R. Isaac* is stated correctly, and there is nothing in the objection raised in arrest of judgment. With respect to the answer in Chancery, it was filed by one who had at the time nothing in the premises, and was, therefore, properly excluded.

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BURROUGH J. I am clearly of opinion that the tenant by curtesy was not a witness in this case. With respect to the deed, I think the pecuniary consideration sufficient without the other services mentioned: it is not a mere formal sum, such as is usually alleged to have been paid by trustees, but a sum which was considerable in those days, and perhaps as much as the worth of an advantage so remote as that which was the object of transfer.

GASELEE J. I see no ground for disturbing this verdict. The witness rejected was the person who would actually have had the right to present, if a verdict had been obtained for the Defendant; for though a living come to a bishop by lapse, he cannot refuse to institute, if a presentation be made before he has taken advantage of the lapse. With respect to the deed, it appears clearly that the twenty shillings was not considered a mere formal sum for the purpose of effecting the conveyance, but the value of the property sold, because it is specified before the other considerations; whereas sums inserted for mere form are usually specified after them. Considering the age of the deed, that only a fourth part of the advowson was sold, and that no evidence was given at the trial, of the annual value of the living at the time of the transfer, there is nothing to shew that the pecuniary consideration was inadequate.

PARK J. The case was left fully to the jury upon all the circumstances.

Rule refused.

1828.

Nov. 8.

VALE and Others, Vouchees.

Where one of the vouchees became insane between the time of executing the warrant of attorney and the passing of the recovery, the Court refused to let it pass as to him, but permitted it as to the other parties.

VALE, one of the vouchees in this recovery, was sane when he executed the warrant of attorney, but shortly afterwards he became lunatic.

Stephen Serjt. on a former day, upon affidavit of that circumstance, moved that the recovery might pass, the other parties all consenting.

The Court took time to consider, and now, referring to a case of *Jamieson*, demandant, *Fletcher*, tenant, in which the same motion was made last *Hilary* term, decided as in that case, that the recovery should pass as to all the parties except the lunatic, because, if he had recovered, he might have revoked the warrant before the passing of the recovery. (a)

(a) See *Walcot*, Vouchee, 3 *Bingb.* 423., in which the same point was decided.

Nov. 8.

MACKIE v. WARREN.

The Court will not discharge a defendant from custody under a *ca. sa.* on the ground that he has been before irregularly taken and discharged under criminal process at the instance of the Plaintiff.

LUDLOW Serjt. moved for a rule *nisi* to discharge the Defendant from custody under a *ca. sa.* in this suit, on the ground, that some weeks before, he had been, at the instance of the Plaintiff, apprehended under criminal process, irregularly issued, and then set at large, upon the irregularity being discovered, the Plain-

tiff

tiff paying the costs. *Ludlow* urged, that the Defendant could not have been retaken if he had been discharged after arrest on a *ca. sa.*, and that he ought to be equally exempt after discharge from the criminal process. But

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The Court, admitting, that if the Defendant had been discharged after he had been once regularly taken, he could not be taken again for the same cause, refused the rule, on the ground that the first taking here was altogether irregular; and *Ludlow*

Took nothing.

CHURCHILL and Another, Assignees of CADOGAN, *Nov. 10.*
 a Bankrupt, v. CREASE.

ASSUMPSIT for money had and received by the Defendant, to the use of the Plaintiffs as assignees of *Cadogan*.

At the trial before *Best C. J.*, *London* sittings after *Trinity* term, it appeared that the bankrupt, who was indebted to the Defendant for work done by him as a paper-hanger and sizer, was committed to prison at the suit of some other creditor on the 19th of *April* 1825, and remained there till the 18th *June* following, when a commission of bankrupt was sued out against him on the act of bankruptcy committed by his lying in prison:

That on the 8th of *June*, the bankrupt, who had suffered a loss by fire, went, by means of a day rule, to the

1. A payment made in *June* 1825 by a debtor, *bonâ fide*, without intention of fraudulent preference, eight days before a commission of bankrupt was issued against him, Held to be protected under the eighty-second section of 6 G. 4. c. 16.

2. The debtor, a prisoner, went, eight days before a commission of bankrupt was sued out against him, to a fire-office, to receive money, payable to him in respect of a loss by fire; a creditor, for labour done, who knew the time when the money was to be paid, without any intimation from the debtor, met him at the office, and obtained out of the sum so received, payment of his own debt, not knowing that his debtor was a prisoner or insolvent; a jury having negatived fraud, Held, that this was not a fraudulent preference by the debtor.

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Hope Insurance Office, to receive 56*l.* the amount of an insurance on the property consumed :

That the Defendant, who had agreed for ready money, and who knew of the fire, and of the day fixed by the office for the payment of the sum insured, went thither, without having made any appointment with the bankrupt, for the purpose of meeting the bankrupt when he should have money in his hand ; and, upon payment being made by the office, pressed for the settlement of his own account : whereupon the bankrupt paid him the amount, 19*l.* 10*s.*, and the Defendant gave a receipt for that sum as for *work done*.

It did not appear that the Defendant knew of the bankrupt's imprisonment or insolvency.

It was contended, that this payment was a fraudulent preference by the bankrupt ; that even if made *bonâ fide*, it was not protected by the 19 G. 2. c. 32. s. 1. which applies only to payments for goods or bills of exchange in the usual course of trade ; and that the provision in 6 G. 4. c. 16. s. 82. which protects such payments, did not come into operation till 1st *September* 1825.

These points were reserved, and the learned Chief Justice left it to the jury to say, whether the bankrupt had made this payment by way of fraudulent preference, or *bonâ fide* at the pressing instance of the Defendant.

The jury found a verdict for the Defendant, and also, that he did not know of the bankrupt's insolvency at the time of the payment in question.

Wilde Serjt. having obtained a rule *nisi* to set aside this verdict, on the grounds relied on at the trial,

Taddy Serjt. began to shew cause, when the Court called on


Wilde

Wilde to support his rule. The circumstance of the bankrupt's having made this payment while he was a prisoner for debt, and only eight days before his commission was sued out, was sufficient to constitute it a fraudulent preference, especially as the debt was not demanded under legal process, which, indeed, could not have operated as matter of alarm on the bankrupt, inasmuch as he was already in confinement. The principle established in *Thornton v. Hargreaves* (a), therefore, applies immediately to the bankrupt's conduct. It was there laid down, that if the payment or assignment does not redeem the trader from any present difficulty, which is the ordinary motive for such a payment or assignment when really made under the pressure of a threat, it must be taken to have been made voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy.

But even if the payment were made *bonâ fide*, it was not protected by the 49 G. 3., because it was made within two months of the suing out of the commission; nor by the 19 G. 2. c. 32., because it was made after an act of bankruptcy, and not for goods or bills of exchange in the usual course of trade. The 6 & 7 G. 4. c. 16. s. 82. is out of the question, because, except as to bankrupts' certificates, and the repeal of the 5 G. 4., that act did not come into operation till the 1st of *September* 1825. (s. 136.) The clause, therefore, which protects all payments "made or hereafter to be made" *bonâ fide* before the date and issuing of a commission, can only apply to payments made and to be made after the 1st *September* 1825.

The enumeration of the cases in which the act was to have a retrospective operation, excludes such operation in any other than the cases enumerated; *Maggs v.*

(a) 7 *East*, 544.

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Hunt (a); and in case of doubt, the act is to be construed beneficially for creditors. (s. 135.)

BEST C. J. I am of opinion that this payment is protected by the 82d section of 6 G. 4. c. 16., which enacts, "that all payments really and *bonâ fide* made, or which hereafter shall be made, by any bankrupt before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy." It is true that, by the 136th section, the full operation of the act is postponed to a period subsequent to the payment in question; and I should have thought that section conclusive, if there had been no conflicting intention to be collected from the act: but the rule is, that where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. Now, unless the expression "payments *made*" refer to a period anterior to the passing of the act, the expression "*hereafter* to be made," is altogether nugatory. It seems to me, therefore, that the legislature contemplated all payments actually made at the time the act came into operation.

Then with regard to the alleged fraudulent preference, it has been contended, that if this were merely a voluntary payment, it amounted under the circumstances to a fraudulent preference as against the other creditors. But fraud must in all cases be proved, not presumed; and here the jury have expressly found, that the Defendant was ignorant of his debtor's insolvency. Nor is it true that the payment was voluntary, and that the debtor would have been in no worse situation had he

(a) 4 Bingham. 212.

refused

refused it; for he was liable to have a detainer lodged against him, and that consideration probably induced him to accede to the demand. The case of *Thornton v. Hargreaves* and others of that class, are not at all applicable. In *Thornton v. Hargreaves* the debtor assigned the whole of his property; and Lord *Ellenborough* said, "Taking the conversation reported between the Defendants and the bankrupt to be a threat of process, I do not see how the execution of such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did, for that left him without any property, and he was immediately obliged to break up his business, and leave his home." *Lawrence J.* said, "If the bill of sale swept away the whole, as it is said, of the bankrupt's property, it would be difficult to say that it was not made in contemplation of bankruptcy, because it would be in itself an act of bankruptcy." Can that be compared to the payment of a debt of 19*l.* fairly contracted, and at the persevering instance of the creditor? It was for the jury to say whether or not there was any fraud in the transaction, and as they have in effect negatived its existence, this rule must be discharged.

PARK J. All cases of this kind depend on their own circumstances, and it is for the jury to say whether any fraud has been committed or not: in the present instance, I think they have come to a right conclusion.

With respect to the question on the 6 G. 4. c. 16. the words of the act, "*made*, or hereafter to be made," are strong to shew that it was intended to protect payments actually made at the time the act came into operation. *Made*, as contrasted with *hereafter to be made*, must mean *heretofore* made. And this payment was no fraudulent preference.

The

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The Defendant, a paper hanger, knew that his debtor was about to receive money at a fire office; he went thither on a day when the office paid for losses, and meeting his debtor with money in his hand, claimed the payment of his debt. He did not know that any act of bankruptcy had been committed, nor even that his debtor was insolvent; he did not sweep away the whole of the property, but merely obtained a small sum for labour, which was to have been paid for at the time it was done. There is no evidence to shew any thing like collusion, and the rule must be discharged.

BURROUGH J. When I heard the finding of the jury, I thought the rule *nisi* ought not to have been granted; that finding excludes all doubt; the Defendant knew nothing of the bankrupt's imprisonment or insolvency, and there is not even a suspicion of collusion. He received but a small part of a sum actually in the debtor's hands, and there was nothing resembling a general transfer of property.

GASELEE J. I see no reason for interfering with the finding of the jury. It was very natural the Defendant should go to the fire office at a time when he knew his debtor was to receive money, and there is not the slightest evidence to shew that he went thither upon any intimation from the debtor.

The rule, therefore, must be

Discharged.

1828.

HENMAN v. DICKINSON.

Nov. 10.

THIS was an action brought to recover the amount of a bill of exchange, purporting to have been drawn the 29th of *February* 1828, for 49*l.* 17*s.* 6*d.* by one *George Potter*, accepted by the Defendant, and indorsed to the Plaintiff, but appearing on the face of it to have undergone alteration.

Where a party
sues on an
instrument
which, on the
face of it, ap-
pears to have
been altered,
it is for him
to shew that
the alteration
has not been
improperly
made.


On the trial of the cause before *Best C. J. London* sittings after *Trinity* term, the wife of the drawer stated that the bill was drawn on the 22d *February* 1828, that it was accepted on the 22d, for 40*l.* 17*s.* 6*d.*, and *Potter* in her presence altered the bill to 49*l.* 17*s.* 6*d.* about eight days before he indorsed it to the Plaintiff. This evidence was objected to, and the point was reserved; but the learned Chief Justice thinking, that where there appeared an alteration on the face of a bill of exchange, the onus of proof to shew that such alteration had not been made since it was accepted, lay with the Plaintiff, a verdict was found for the Defendant, with leave for the Plaintiff to move to set it aside.

Taddy Serjt. now moved accordingly, on the ground that Mrs. *Potter* had proved a forgery, and that a wife could not be permitted to give evidence to criminate her husband. *Rex v. Cliviger*. (a) [*Park J.* In *Rex v. All Saints, Worcester* (b), the Court of King's Bench were of opinion, that the rule laid down in *Rex v. Cliviger*, was too large and general.] He then urged, that a party who produces a bill with an alteration

(a) 2 *T. R.* 263.(b) 1 *Pbill. Ev.* 82.

apparent

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HENMAN
v.
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apparent on the face of it, ought not to be called on to shew that the alteration was made before acceptance; but that the *onus* of shewing that it was improperly made after acceptance ought to be thrown on the Defendant, for an innocent indorsee has no means of knowing when or how such an alteration was made.

BEST C. J. It is not necessary for us to decide the first point: if it were, it would require consideration, because the authority of *Rex v. Cliviger* has been doubted. But we are of opinion, that where an alteration appears upon the face of a bill, the party producing it must shew that the alteration was made with consent of parties, or before the issuing the bill.

PARK J. Where the Plaintiff sues on an instrument which has manifestly been altered, it is for him to shew that the alteration was not improperly made. I am sure this has been decided, and good sense points out that it ought to be so, because the Defendant can have no means of knowing the circumstances of a subsequent alteration.

The rest of the Court concurred; and *Taddy*
Took nothing.

1828.

COX v. BENT and Others.

Nov. 10.

REPLEVIN for taking the Plaintiff's goods in a place called the *Newcastle Brewery*.

Avowry, that the Plaintiff for a year ending *March 25. 1827*, held the *Newcastle Brewery* as tenant to the Defendants, by virtue of a demise thereof to him, at the yearly rent of 450*l.*, payable half-yearly on 25th *March* and 29th *September*, and, because a year's rent was due, the Defendants avowed the taking, &c.

Pleas, *non tenuit* and *riens in arriere*, and issue thereon.

At the trial before *Gaselee J.*, last *Stafford* Summer assizes, it appeared that the Plaintiff held the premises in question under an agreement bearing date 7th *December 1824*, by which the Defendants agreed to let and demise them to him "in consideration of the rent of 450*l.*, and of the covenants and agreements to be entered into by the said *C. Cox*, in a certain indenture of lease to be executed on or before the 29th day of *September* next ensuing." The Plaintiff had paid no rent, but an account of various dealings between him and the Defendants had been presented to him by the Defendants' clerk, the first item of which was, "Half a year's rent, 250*l.*;" when the Plaintiff said, "It is overcharged 25*l.*;" and the clerk thereupon altered it to 225*l.* The account had been disputed in other respects.

The learned Judge thought that, by thus assenting to that item in the account, the Plaintiff had admitted a tenancy from year to year at 450*l.* rent, payable half-yearly;

Plaintiff, who had entered on premises under an agreement for a lease, admitted a charge of half a year's rent in an account between him and his landlord:

Held, that this constituted him a tenant from year to year, and liable to distress.

1828.

COX

v.

BENT.

yearly; and, under his direction, a verdict was found for the avowants, which

Russell Serjt. now moved to set aside, and enter instead a verdict for the Plaintiff. He relied on *Dunk v. Hunter* (a) as an authority to shew that an agreement for a future demise, by an indenture of lease, is incompatible with an actual demise, and that without an actual demise the avowants could have no right to distrain. He admitted that, according to the decision in *Knight v. Benett* (b), a payment of rent under such an agreement would constitute an acknowledgment of a tenancy from year to year, under which the landlord would be authorized to distrain. Here there had been no payment, but only an admission of an item in a disputed account.

GASELEE J. I proceeded on the ground that the admission was equivalent to a payment of so much rent, and that the Plaintiff had thereby become tenant from year to year.

BEST C. J. This falls within the principle established by *Knight v. Benett*.

Rule refused.

(a) 5 B. & A. 322.

(b) 3 Bingb. 361.

1828.

SEATON v. BENEDICT.

Nov. 11.

IN this cause, which was sent down for a second trial pursuant to the decision *ante*, p. 28., the jury, upon the same facts as are there stated, having found a verdict for the Plaintiff for 10s., at the last *Middlesex* sittings before *Best* C. J.,

Wilde Serjt. moved to set aside this verdict, or that the learned Judge who presided at the trial should certify, to deprive the Plaintiff of his costs.

The articles of dress for which the action was brought having been ordered by, and delivered to, the Defendant's wife, and being unnecessary, the Defendant having amply supplied her himself, he could only be liable for such as she had worn in his presence without objection on his part. The amount of these was more than covered by 10*l.* paid into court. The verdict, therefore, was unintelligible: for if the jury thought necessary the articles not covered by the payment into court, they should have found for the whole 18*l.* 5*s.* 6*d.*; and if they were not necessary, the Defendant was entitled to a verdict.

BEST C. J. I shall certify; and it will be mercy to the Plaintiff to do so: for the Court would grant repeated new trials rather than allow a verdict to prevail which is contrary to law and justice.

Rule absolute for the certificate.

Where a Plaintiff furnished Defendant's wife with articles of dress, which were rendered unnecessary by the Defendant's having supplied her wardrobe amply, and in an action for the price of the articles (18*l.* 5*s.* 6*d.*), the jury found a verdict for Plaintiff, damages 10*s.*, the Judge certified to deprive him of costs.

1828.

Nov. 11.

FURNELL v. THOMAS.

It is no defence to an action by the owner of a ship for demurrage, that the owner has omitted to procure the necessary papers for the discharge of the cargo, if he omitted to do so at the request of the Defendant.

ACTION by the Plaintiff, as a ship-owner, against the Defendant, as charterer, for demurrage.

At the trial before *Best C. J.*, *London* sittings after *Trinity* term, it appeared that the vessel had arrived in the port of *London*, laden with potatoes, the price of which was at the time of her arrival likely to fall in the market; whereupon the Defendant, hoping that in a few days the price might rise, said to the Plaintiff, “Don’t shew yourself, or you’ll get down the price;” and the Plaintiff accordingly abstained for some time to procure from the custom-house the papers necessary to authorize the unloading of the cargo. The defence set up was, that till he had procured these papers, which it was his business to procure, the vessel could not unload; and that the demurrage having thus been occasioned by his own omission, he could not recover from the Defendant.

The learned Chief Justice being of opinion that it did not lie with the Defendant to make this objection after he had, for his own purposes, requested the Plaintiff not to shew himself, a verdict was found for the Plaintiff; which

Wilde Serjt. now moved to set aside, on the ground that the Plaintiff was bound to procure the papers from the custom-house before he could charge the Defendant with delay; *Barret v. Dutton* (a); and that, at all events, the Plaintiff by acquiescing in the Defendant’s request

(a) 4 *Campb.* 333.

for time, must be intended to have acquiesced on the terms of not charging for demurrage. A mere conversation could not exonerate the Plaintiff from duties imposed by law.

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FURNELL
v.
THOMAS.

BEST C. J. I am of the same opinion as at *Nisi Prius*. Generally speaking, if the owner does not procure the necessary papers for the clearing or discharge of the ship, he cannot claim demurrage. But here he was prevented from doing so by the Defendant's saying, "Don't shew yourself, or you'll get down the price of my cargo;" and the Defendant never informed him when the price rose. There can be no doubt the vessel was made a warehouse for the purposes of the Defendant.

PARK J. I am of the same opinion. It is urged that a mere conversation cannot exonerate the Plaintiff from the rule of law: but this was a conversation followed by an act, namely, the Defendant's keeping possession of the ship; and he does not appear ever to have applied to the Plaintiff to procure the necessary documents.

The rest of the Court concurred, and the rule was
Refused.

1828.

Nov. 12.

ROOKE v. WASP.

Where Defendant, after an application by Plaintiff's attorney, paid Plaintiff the debt demanded, without notice that a writ had been sued out, about which the Plaintiff said nothing, and the attorney afterwards arrested Defendant for the costs on a writ which had been sued out before the payment of the debt, the Court stayed the proceedings without costs.

ON the 7th of *October* last, the Plaintiff's attorney wrote to the Defendant, requesting payment of a debt of 23*l.* due from the Defendant to the Plaintiff.

On the 11th, the Defendant not knowing that any writ had been sued out against him, paid the Plaintiff himself the 23*l.*; and upon that occasion received no notice of any such writ. On the 16th, the Plaintiff's attorney demanded the sum of 8*l.* 10*s.* for costs, and not obtaining it, arrested and held the Defendant to bail on the 3d of *November*, by virtue of a *capias* which had been issued on the 8th of *October* preceding.

Upon an affidavit of these facts,

Jones Serjt. obtained a rule *nisi* to deliver up the bail-bond to be cancelled, and to stay proceedings.

Taddy Serjt. who shewed cause, urged that there was no other way by which the Plaintiff could obtain the costs of his writ.

But the Court, under all the circumstances, ordered the proceedings to be staid without costs. (a)

Rule absolute to stay proceedings.

(a) See *Toms v. Poqwell*, 7 *East*, 530. *Page v. Wiple*, 3 *East*, 314.

1828.

TURNER and Another v. PRINCE.

Nov. 17

THE Plaintiffs, who were builders, had agreed to let a house on lease to the Defendant, after they should have finished it, according to a specified plan, "any deviation from the above method of finishing to be paid for or allowed for according to its value."

When the house was finished, and the Defendant had entered, the Plaintiffs, about *August* 1826, sent him in a bill of 125*l.* 9*s.* 8*d.* for extra work.

Defendant declined paying, on the ground that the Plaintiffs had not made out the lease; but

The lease having been executed on the 8th of *March* 1827, and repeated applications having been made to the Defendant, in vain, for payment of the 125*l.* 9*s.* 8*d.*, the Plaintiffs, on the 26th of *April* following, arrested him on an affidavit of debt for 100*l.* and upwards.

The Defendant paid 10*l.* 9*s.* 3*d.* into Court, and upon the cause coming on for trial in *July*, a verdict was taken for the Plaintiffs, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred; the costs of the cause to abide the event, those of the arbitration to be in the discretion of the arbitrator.

Upon the reference, the Defendant established a claim against the Plaintiffs for an allowance for deviations from the method of finishing the house agreed on by them, to the extent of 63*l.* 13*s.* 2*d.*; and the arbitrator, thereupon, awarded that he should pay the Plaintiffs 29*l.* 8*s.* 9*d.* beyond the sum paid into court, together with the costs of the award. The Plaintiffs' costs of the cause amounted on taxation to 68*l.* 6*s.* 3*d.*, which, with the 29*l.* 8*s.* 9*d.* the

Arrest for 100*l.* Verdict for Plaintiff, subject to an award; costs to abide the event; 39*l.* 18*s.* found to be due, and the transactions between the parties, complicated. The Court refused to allow the Defendant his costs under 43 G. 3.

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Defendant paid into court in *July* last, under a Judge's order, staying proceedings till the result of an application on the subject to this Court should be known.

Wilde Serjt. accordingly, upon affidavits disclosing the Defendant's case, this term obtained a rule calling on the Plaintiffs to shew cause why, upon payment by the Plaintiffs to the Defendant of his costs of this suit pursuant to the 43 G. 3. c. 46., the sum of 29*l.* 8*s.* 9*d.*, the residue of the sum paid into court under the Judge's order, should not be paid to the Plaintiffs in satisfaction of their whole claim; the Defendant contending that the arrest for 100*l.*, when there were counter claims on his part, must be esteemed malicious, after the arbitrator had found only 29*l.* 8*s.* 9*d.* to be due beyond the 10*l.* 9*s.* 3*d.* paid into court.

Taddy Serjt. shewed cause. The costs of the cause were to abide the event of the award; and the arbitrator having established the verdict taken for the Plaintiffs, the Court has no jurisdiction under the 43 G. 3. *Paine v. Acton* (a), is in point against the application: but even if the Court could interfere after the award, it would decline doing so upon a disputed account in a complicated agreement, after a reference of all matters in difference.

Wilde. Though the reference was of all matters in difference, nothing was entered on before the arbitrator but matters in the cause. In *Summers v. Formby* (b), it was holden that where a cause is referred upon a new trial, and nothing is said about costs in the rule granting the new trial, the plaintiff is not entitled to his costs of the former trial, although the arbitrator decides in his favour; and from what fell from the Court in that case, it is clear that the

(a) 1 B. & B. 278.

(b) 1 B. & C. 100.

award of an arbitrator does not deprive the Court of its jurisdiction to allow the Defendant costs under 43 G. 3. c. 46. "The reference was equivalent to a trial, and it has been held to be so, so as to entitle the Defendant to costs where the Plaintiff does not recover the sum for which the Defendant was arrested."

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BEST C. J. I will not say that the Court will in no case grant a rule to give the Defendant his costs where the arrest is for 100*l.* and the Plaintiff recovers only 39*l.* But it must be a very strong case. This is much too complicated a transaction for us to say that the Defendant could successfully sue the Plaintiff for maliciously holding him to bail; and unless he could do so, there is no ground for making this rule absolute.

Rule discharged.

SHARPE, Assignee of the Sheriff of MIDDLESEX,
 v. ABBEY and Others.

Nov. 18.

DEBT on bail-bond by the assignee of the sheriff.

The Plaintiff declared that by virtue of a writ *ca. ad. resp.* directed to the sheriff of the county of *Middlesex*, out of the Court of our Lord the King of the Bench at *Westminster* in due manner issued, and returnable therein in fifteen days of *Easter* 1828, *Robert Abbey* was taken and arrested by the sheriff at the suit of the Plaintiff; by which writ the sheriff was commanded to take *Abbey* if he should be found in his bailiwick, and safely to keep him so as to have his body before our Lord the King's Justices at *Westminster*, in fifteen days of *Easter* 1828, to answer the Plaintiff in a plea of tres-

In a declaration on a bail-bond, it is not necessary to aver that the writ on which Defendant was arrested was issued on an affidavit of debt, and indorsed with the sum sworn to.

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ABBEY.

pass, and also, according to the custom of his Majesty's Court of Common Bench, in a plea of trespass on the case on promises to the damage of the Plaintiff of 300*l*.

The declaration then stated in the usual way, that the sheriff took bail for the appearance of *Abbey*, who, before the return of the writ, executed a bond conditioned for *Abbey's* appearance; that *Abbey* did not appear, and that the sheriff assigned the bond to the Plaintiff. Breach; non-payment.

Demurrer, on the ground that the declaration contained no allegation that any affidavit was made and filed of any cause of action of the said Plaintiff against the said *Robert Abbey*, amounting to the sum of 20*l*. or upwards; nor that the sum or sums specified in any such affidavit were endorsed upon the back of the writ in the declaration mentioned; nor that the writ was marked or endorsed for bail for any sum of money for which the Defendant might be lawfully held to bail, or for any sum whatever; nor that the bail taken by the sheriff in the declaration mentioned, was taken for the sum or sums endorsed upon the writ.

Wilde Serjt., in support of the demurrer, admitted that the case of *Whiskard v. Wilder* (a), was in point against him; but relied on the disapprobation of that decision expressed by *Mansfield* C. J. in *Hill v. Heale* (b), and on the positive requisition of the statute 12 G. 1. c. 29., that the sum for which the defendant is arrested shall be indorsed on the writ.

BEST C. J. The question is, not whether an affidavit of debt, or an indorsement on the writ of the sum sworn to, be necessary to the validity of an arrest, but whether it be necessary in an action on a bail-bond to

(a) 1 Burr. 330.

(b) 2 N. R. 202.

encumber the record with statements of this preliminary matter. The case of *Whiskard v. Wilder* has recently been confirmed in this Court by the case of *Wilcoxon v. Nightingale*. (a)

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PARK J. It was also confirmed in *Arundell v. White*. (b)

GAZELEE J. It is not necessary for us to decide whether the statute of G. 1. is directory or imperative; the only point here is, Whether what is prescribed by that statute with regard to arrests should appear on the declaration in an action on a bail-bond? The precedents are both ways, but the form pursued in the present case is the more usual.

Judgment for the Plaintiff.

(a) 4 Bingh. 501.

(b) 14 East, 224.

CHRISTIE v. HAMLET.

Nov. 19.

THIS cause was referred to arbitration by an order of the Chief Justice, made "upon hearing the attornies on both sides, and by their consent."

The arbitrators commenced their award by reciting, that the cause came on to be tried at the sittings at *Guildhall*, in *June* 1828, before the Lord Chief Justice; and that then, by consent of Plaintiff and Defendant, their counsel and attornies, an order was made that it should be referred to the arbitrators in question.

Wilde Serjt., upon an affidavit that no such order of *Nisi Prius* as that set out in the award had ever been made,

In moving to set aside an award made under a rule of court, the rule *nisi* ought to be drawn up on reading the rule under which the matter was referred, and the objections to the award ought to be specified.

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made, obtained a rule *nisi* to set the award aside: but the rule did not state on what grounds, nor was it expressed to have been drawn up on reading the rule of Court on which the cause had been referred; that rule, however, was set out in the affidavit above mentioned.

Taddy Serjt., who shewed cause, objected that the rule *nisi* ought to have been drawn up on reading the rule which authorized the arbitration, and that the objections to the award ought to have been specified in the rule *nisi*, as, in a rule for setting aside an annuity, the objections to the grant.

Wilde urged, that it was sufficient that the original rule had been set out in the affidavit to which the rule *nisi* referred; but

The Court was against him upon both grounds, and added, that they had no authority to interfere, the award being a nullity which they could not enforce by attachment.

Rule discharged.

Nov. 24.

VICKERS v. GALLIMORE.

Trespass *qu. cl. fr.*; pleas, not guilty, and justifications under a right of way. Issue joined on not guilty;


right of way traversed, and issue joined thereon. New assignment and judgment by default thereon. Verdict for Plaintiff 1s. on issue of not guilty; 40s. damages on the new assignment; verdict for Defendant on one of the justifications: Held, that the Plaintiff was entitled to the general costs in the cause.

TRESPASS for breaking and entering the Plaintiff's close, and prostrating his wall.

The Defendant pleaded, first, the general issue, not guilty, and then seven special pleas, justifying the trespass under an alleged right of way. The Plaintiff, in

reply,

reply, joined issue on the first plea, traversed the special pleas, and new-assigned. The Defendant joined issue on the traverses, and suffered judgment to go by default on the new assignment.

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At the trial, last *Yorkshire* Assizes, a verdict was found for the Plaintiff with 1s. damages, on the general issue, and on all the other pleas except the third, on which a verdict was found for the Defendant. The damages on the judgment by default on the new assignment, were, by consent, assessed at 40s., on the understanding that the finding to that amount should not affect the question of costs.

Cross Serjt., on the ground that a record in this state shewed the substantial merits of the cause to be with the Defendant, obtained a rule calling on the Plaintiff to shew cause why the *postea* should not be delivered to the Defendant.

Wilde Serjt. shewed cause. If the Defendant had not pleaded the general issue, or had withdrawn it (*a*), there might have been some colour for the motion. As it is, by allowing that plea to stand, he has compelled the Plaintiff to incur the expence of a trial, and the verdict being in his favour upon the issue on that plea, after a judgment by default on the new assignment, he is entitled to the general costs of the cause. *House v. The Commissioners of the Thames Navigation* (*b*) is precisely in point. So likewise, *Longden v. Bourn*. (*c*)

Cross. If the verdict for the Defendant goes substantially to the whole cause of action, he is entitled to the general costs of the cause. In *House v. The Com-*

(*a*) 1 *Wms. Saund.* (last edit.)
 300 *a*.

(*b*) 3 *B. & B.* 117.
 (*c*) 1 *B. & C.* 278.

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missioners of the Thames Navigation, a plea of licence, on which the defendant obtained a verdict, went only to a part of the cause of action, and the Judge certified that the trespass was malicious. In *Longden v. Bourn*, the plaintiff recovered 100*l.* damages on the new assignment. But in the present case the damages were purely nominal, and the Defendant having established her right of way, the third plea went to the root of the plaintiff's action. If the Plaintiff had suffered judgment by default on the third plea, there would have been no necessity for going to trial; and not having done so, the Defendant is entitled to the general costs. *Thornton v. Williamson.* (a)

But *Otkir v. Calvert* (b), which is subsequent to any of the cases cited, and in which the Court took time to enquire into and settle the practice, is in point for the Defendant. There, to a declaration in trespass *quare clausum fregit*, the defendant pleaded the general issue, and ten special pleas justifying the trespass under a right of way. The plaintiff traversed the right of way, and new assigned. Issue was joined on the general issue and on the traverses, and not guilty pleaded to the new assignment; on which, likewise, issue was joined. Verdict for the plaintiff, without damages, on the general issue; (as in *House v. The Commissioners of the Thames Navigation*); for the defendant on the two first special pleas, and for the plaintiff on all the other issues. It was holden, on the authority of *Benett v. Coster* (c), and *Vivian v. Blake* (d), that where a plea, which goes to the whole of the cause of action is found for the defendant, the general costs of the cause go to the defendant, and to the plaintiff only the costs of the pleadings on the issues found for him. The principle is, that where

(a) 13 *East*, 191.(b) 1 *Bingh.* 275.(c) 1 *B. & B.* 465.(d) 11 *East*, 263.

issues are found for both parties, costs shall be awarded according to the substantial merits of the cause. *Harber v. Rand* (a).

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BEST C. J. The question has been decided by the cases of *House v. The Commissioners of the Thames Navigation* and *Longden v. Bourn*. The pleadings in those cases were precisely the same as in the present—Not guilty, on which issue was joined; justifications of the trespass, under rights of way and a licence, which were traversed; and a new assignment, on which judgment was suffered to go by default. Verdict for the defendant on some of the justifications, and for the plaintiff on the other issues. The Court held, that as the plaintiff had been driven to trial by the plea of not guilty, he was entitled to the general costs in the cause.

In *Harber v. Rand*, the general issue was not pleaded. The costs must be determined by the state of the record at the end of the cause: to enter on the merits for that purpose, would lead to new and intricate enquiry: and if the Defendant pleads an unnecessary plea, he must pay for the expense occasioned by it. The plea of not guilty rendered it necessary for the Plaintiff to go to the expense of proving the trespass, and the Defendant ought to bear that expence, or to have withdrawn the general issue, as is suggested in the note in *Wms. Saunders*, 300 a.

PARK J. concurred.

BURROUGH J. The substantial merits of the cause cannot be entered into upon a motion like this. We must look at the record. The Defendant compelled the Plaintiff to go down to trial on the general issue, and the

(a) 9 Price, 336.

verdict

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verdict having been for him on that issue, he is entitled to his costs.

GAZELEE J. *House v. The Commissioners of the Thames Navigation, and Longden v. Bourn*, are in point. In *Harber v. Rand*, there was no general issue. The rule must be

Discharged.

Nov. 24.

RIDDELL v. SUTTON, Executrix of SUTTON.

1. *Debt* lies against an executrix upon a cause of action accruing after the death of the testator.

2. Where an executrix referred to arbitration to be finally determined on, certain disputes and differences respecting certain unsettled accounts, and the arbitrators, without finding assets, awarded her to pay a certain sum: Held, that *plene administravit* was no bar to an action on the award.

DEBT, on an award. The declaration stated, that by an agreement made 31st *December* 1822, between the Plaintiff, on the one part, and the Defendant, as executrix of *Sutton*, of the other part, after reciting therein that *disputes and differences* had arisen, and were depending between the Plaintiff and the Defendant as executrix as aforesaid, *respecting certain unsettled accounts* between them, which they had mutually agreed to refer to the award and determination of the persons therein-after named; therefore, *for the finally settling such disputes and differences*, it was, amongst other things, agreed by and between the parties thereto, mutually and reciprocally, that the *said matters in dispute* between them should be, and were thereby referred to the *final award* and determination of *Thomas Rushton* and *Thomas Birch*, so as they should make their award before the 20th of *January* then next; and if they should not do so, the matters in difference were referred to the award and determination of such person as umpire as should be named in manner thereafter mentioned: costs to be in the discretion of the arbitrators or umpire: that the said *Thomas Rushton* and *Thomas Birch*, having taken upon themselves

selves the said arbitration, and having heard and duly weighed the allegations and proofs of both of the said parties concerning the matters so in difference as aforesaid, and having examined the various books, accounts, papers, and writings relating to the said matters in dispute, and also the said parties themselves, did, in due manner and within the time limited for making the said award, to wit, on the 18th of *January*, in the year of our Lord 1823, at, &c. make their award and determination of and concerning the said matters in dispute, so referred to them as aforesaid, in writing under their hands ready to be delivered to the said parties, or such of them as should require the same, bearing date on a certain day and year, to wit, the same day and year in that behalf aforesaid. And by the said award, they the said *Thomas Rushton* and *Thomas Birch* did find that there remained a balance due from the said Defendant to the said Plaintiff of 54*l.* 0*s.* 10½*d.*; and they did, therefore, thereby award, order, and direct the payment of such balance to be made by the said Defendant to the said Plaintiff, on or before the 31st day of *March* then next. And they did thereby further award, order, and direct, that each of the said parties in difference should pay his and her own costs and charges attending the same reference. That the said Defendant, executrix as aforesaid, did not, nor would, on the said 31st day of *March*, in the year 1823 aforesaid, make payment to the said Plaintiff of the said balance or sum of 54*l.* 0*s.* 10½*d.* in the said award mentioned, or any part thereof, nor has she since paid the same, or any part thereof.

The Defendant pleaded, first, *non detinet*, on which issue was joined. Secondly, *plenè administravit*; and, thirdly, that no evidence was given or offered before the said *Thomas Rushton* and *Thomas Birch*, on occasion of the said arbitration, nor did they the said *Thomas Rushton*

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ton and *Thomas Birch* receive any proof, nor was it admitted by or on behalf of the said Defendant, that she, the said Defendant, as executrix as aforesaid, had, at any time, before the making of the said supposed award in that Court mentioned, in her hands any goods, chattels, monies, or effects, which were of the said *William James Sutton*, deceased, at the time of his death to be administered.

Demurrer *inde*, and joinder.

Russell Serjt. in support of the demurrer.

The pleas are ill. First, the plea of *plenè administravit*; because the mere general submission to arbitration was an admission of assets; *Barry v. Bush* (a). In that case, the defendant bound himself, as administrator, to abide by an award to be made touching all matters in dispute between his intestate and another person; and the arbitrator awarded that he, as administrator, should pay a certain sum of 298*l.*, and it was held, that he could not plead *plenè administravit* to debt on the bond. It was contended, that the Defendant was not bound by the terms of the award to pay the money awarded, absolutely, but only as administrator, out of the assets of the intestate. But *Ashhurst* J. said, — “There is no doubt but that this plea is bad, for the entering into the bond amounts to an admission of assets, and the defendant shall not afterwards be permitted to dispute it. The bond given by the defendant to abide by the award was an undertaking to pay whatever sum the arbitrator should award, without any regard to assets.” And *per Buller* J. “This is a bond given by the administrator, by which he bound himself, his heirs, executors, and administrators. The question, then, is,

(a) 1 T. R. 691.

Whether

whether he had bound himself personally or not; and I think there can be no doubt but he has." *Pearson and others, Assignees of Scott, a Bankrupt, v. Henry (a)*, which will probably be cited on the other side, was not an action on an award, but *assumpsit* for goods sold and delivered; to which the plea was, *plene administravit*, and, in order to prove assets, a submission to arbitration by the defendant, as administrator, and an award, whereby the sum of 2014*l.* was awarded to be due from the intestate to the bankrupt's estate (but not saying by whom it was to be paid), was given in evidence. This was held, under the circumstances, not to be an admission of assets; for the submission did not appear to have been any thing more than a submission to take accounts. The submission in the present case is of all matters in dispute; and in *Robson and another, Assignees, &c. v. ——— (b)*, the Lord Chancellor said, "If an executor or administrator think fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission." So in *Wansborough v. Dyer (c)*, it was decided, that the trustees of an insolvent debtor by entering into an arbitration bond, admitted that they had assets. Here, too, the arbitrators not only ascertained the amount of the demand, but awarded the Defendant to pay that amount, which of itself is a determination of the question of assets; as may be collected from what fell from Lord Kenyon in speaking of the case of *Barry v. Rush*, "There the defendant submitted to pay what was awarded, and the arbitrator did award that he should pay a certain sum, but here (in *Pearson v. Henry*) the arbitrator has only ascertained the amount due from the intestate, but has not

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(a) 5 T. R. 6.

(b) 2 Rose, 50.

(c) 2 Chit. Rep. 40.

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directed the defendant to pay it." And he considers the effect of a bond to abide the award, as an undertaking to pay whatever the arbitrator should award, without any regard to assets. Here the agreement set out in the declaration amounts in effect, to an agreement to abide by the award. And the case of *Worthington v. Barlow* (a), is conclusive on the point. Lord *Kenyon* there said, "The decision in *Pearson v. Henry* must be taken with reference to the facts of that case. There the arbitrator only ascertained the amount of the demand, without ordering the administratrix to pay it, but here the arbitrator has awarded that the defendant, the administratrix, shall pay the plaintiff's demand. The submission to arbitration by the administratrix was a reference not only of the cause of action, but also of the other question, Whether or not the administratrix had assets? And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between these parties that the administratrix had assets to pay the debt."

The last plea, — that no evidence was offered of assets, nor were they admitted, — is clearly bad.

If the defendant does not choose to bring forward that ground of defence, it must be taken as admitted. She ought at least to have offered evidence, and is, in fact, pleading her own default. If, as the Lord Chancellor said in *Robson and another, Assignees, v. ———*, the submission without protesting, &c. is an admission of assets, the attending the arbitrator and going through a case without bringing forward that point, must be an admission. Even the misconduct of an arbitrator in not having heard evidence cannot be pleaded in bar to an action on bond, conditioned for the performance

(a) 7 T.R. 453.

of the award; but is only matter for application to the equitable jurisdiction of the Court to set aside the award: *Braddick v. Thompson*. (a) And in the notes to *Veale v. Warner* (b), it is said, "There seems to be no case or dictum where a plea of this sort has been held to be pleadable, nor a precedent of such plea to be found in any of the books of entries."

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Storks Serjt. contra. Taking the whole of the submission together, this was not a submission of all matters in difference, but merely a reference of accounts, so that the arbitrators have exceeded their authority in ordering payment by the Defendant; at all events, in ordering payment without finding or requiring evidence of assets. The pleas, therefore, are not affected by the cases relied on for the Plaintiff, for in all those cases the submission was substantially of all matters in difference, and *Pearson v. Henry* is in point for the Defendant. In *Love v. Honeybourne* (c), where an arbitrator ordered an executor to pay a sum out of the assets in his hands, although the Court did not decide the point whether a submission to arbitration by the executor was an admission of assets, *Abbott C. J.* spoke on the point in terms of doubt, saying, "It may not conclude him from questioning whether he has any assets or not to pay the money;" and *Holroyd J.* said, "If the plaintiff had fully administered at that time, he would not be bound to pay."

But the declaration is ill; for the action being against an executrix is improperly conceived in debt. 1 *Wms. Saund.* 68. note 2. *Pinchon's case*. (d)

Russell. In *Love v. Honeybourne*, the award being

(a) 8 *East*, 344.(c) 4 *Dowl. & Ry.* 814.(b) 1 *Wms. Saund.* 327 a.(d) 9 *Rep.* 87 b.

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expressly to pay out of assets, the executor was not personally bound.

The objection to the declaration is ill founded: for this action of debt is brought on a debt contracted by the executor, but it is only on debts contracted by the testator that an action of debt does not lie against the executor, and that exemption rests on the obsolete doctrine of wager of law, which is now altogether discountenanced: *King v. Williams.* (a) Though an executor could not undertake to wage his law of a debt alleged to have been contracted by his testator, he is competent to do so with respect to a debt contracted by himself.

BEST C. J. This is an action of debt against the Defendant as executrix of *Sutton*, on an award which has proceeded on her submission.

It has been objected on her part, first, that the action of debt does not lie against an executor: but the principle on which that has been decided is, that an executor cannot wage his law of a debt contracted by his testator; it does not apply, therefore, to a case like the present, where the undertaking to pay has originated with the representative, who is therefore better acquainted with the transaction than the testator could have been.

It has been contended, secondly, that a plea of *plene administravit* is a good answer to the Plaintiff's demand; I think it is not. The case of *Robson v. ———* contains all the good sense that bears on the subject: if a reference be submitted to by an executor, and he does not protest in the first instance that he has no assets, he should not be afterwards allowed to say so, because in that case the opposite party will have been put to the expense of an arbitration to no purpose. The arbitra-

(a) 4 Dowl. 507. 3.

tion should be placed on the same footing as an action, in which, if an executor omit to plead that he is without assets, he cannot afterwards set up that ground of defence.

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There is no ground for asserting that the arbitrator's authority was in this case limited to the investigation of accounts and finding a balance. The agreement set out in the declaration recites, that disputes and differences were depending between the Plaintiff and Defendant respecting certain unsettled accounts, and that for *finally settling* such disputes and differences, it was agreed that the said matters in dispute between the parties should be referred to the *final* award and determination of the arbitrators. But the arbitrators could not finally settle the disputes between the parties by merely finding a balance.

The allegation that no evidence of any assets was tendered to the arbitrators, cannot be the subject of a plea. For aught that appears on the plea in which this is alleged, the possession of assets might not have been disputed; and if the arbitrators have misconducted themselves, that is ground for another mode of proceeding. Our judgment must be for the Plaintiff.

PARK J. I have no doubt in this case. The third plea goes chiefly to shew misconduct in the arbitrators, which ought, if it existed, to be the subject of an application to the Court, and not of a plea. But looking at the recital in the submission, and at the whole of the case, I think it clear that the Defendant admitted assets, and submitted to a final settlement of all disputes: that could not be but by paying what should be found due.

BURROUGH J. There could be no wager of law in this case, the cause of action being a written agreement, which is set out in the first count. The arbitrators had

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authority to decide in the manner they have done, and to award payment. The pleas are a mere experiment.

GASELEE J. I thought the point too clear to be argued, and am still of opinion that the Plaintiff is entitled to judgment. The objection on the ground of wager of law does not apply, because this action is not brought on a contract of the testator's. With regard to the question of assets, the Defendant, by submitting to a reference, without protesting that she was not furnished with assets, must be taken to have left the mode of payment to the consideration of the arbitrators.

Judgment for the Plaintiff.

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AMNER and Another v. CATTELL.

The Court discharged a rule for changing the *venue*, on an affidavit that the Defendant's attorney had said he should change the *venue* to postpone the trial, and (which was the fact), that in the interim, an act would come into operation which would defeat the Plaintiff's claim.

INDEBITATUS assumpsit, to which the Defendant pleaded the statute of limitations, and the Plaintiff replied that the cause of action accrued within six years.

Adams Serjt. having obtained a rule *nisi*, on the part of the Defendant, to change the *venue* from *London* to *Warwick*, on the usual affidavit,

Merewether Serjt. shewed cause upon an affidavit of the Plaintiff's attorney, which stated that he had, upon commencing the action, written to the Defendant's attorney, informing him of the Defendant's admissions and promises of payment of the debts sought to be recovered; that he afterwards called on the Defendant's attorney for his undertaking for the appearance of the Defendant, when the attorney informed him that Lord

Tenter-

Tenterden's act came into operation on the 1st of January, and that he should change the *venue*, and beat the Plaintiff, as he had no promise in writing.

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The learned Serjeant contended that it was evident the Defendant did not seek to change the *venue*, because the cause of action arose in *Warwickshire*, or to further the purposes of justice, but because the trial would by such change of *venue* be postponed to a period at which the plaintiff's claim might be defeated by a law coming into operation after the commencement of his action. The object of permitting a change of *venue* was to advance the ends of justice; and where such a design as the present was made manifest, the Court would best consult the ends of justice by discharging the rule.

Adams. The rule for changing the *venue* has, hitherto, been always granted as a matter of right, unless the opposite party will undertake to give material evidence in the county from which it is proposed to remove the cause. It is, therefore, unnecessary to enter into the alleged conversation on the subject of the new statute; but if that statute were passed for the furtherance of the ends of justice, by setting disputes at rest after a certain lapse of time, the Defendant's intention, as alleged, is in furtherance of the statute, and has nothing in it opposed to the ends of justice. At all events, he should be allowed to answer an affidavit so out of the usual course on such a rule.

BEST C. J. I think the *venue* ought not to be changed in this case; but, in discharging the application, the Court does nothing inconsistent with the provisions of the new act; on the contrary, it falls in with the intentions of the legislature, because it was with a view to prevent an *ex post facto* operation with respect to suits

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already commenced, that the period of the act's coming into force, was postponed till six months after it passed. To make this rule absolute would be, in effect, to put off the trial till after the next term, while, if it were tried after the present term, the plaintiff might succeed on a parol promise, which when the act came into operation might prove insufficient; though upon that point I abstain from pronouncing any opinion: but acting on the spirit of the postponing clause, we ought not to prevent the Plaintiff from trying his cause, if he be enabled to do so, within the time limited by the act for the continuance of the old law.

I do not agree that no cause can be shewn against a rule of this sort, but undertaking to give material evidence in the county from which it is sought to remove the *venue*. I have often heard other causes shewn; and where it appears that justice cannot be had if the *venue* is changed, it ought not to be changed.

Supposing a plaintiff to rely on a promise, which would be available but for the postponement of a trial, it would be doing injustice to postpone it. I think, therefore, this rule ought to be discharged.

PARK J. I am of the same opinion; and I agree that upon motions of this kind other causes may be shewn against the rule, besides undertaking to give material evidence in the county from which it is sought to remove the *venue*. In the King's Bench they are made the subject of a separate motion, but in this Court they may be brought forward in shewing cause against the original rule. With respect to the new statute requiring a written promise to render a party liable in respect of a debt extinguished by the statute of frauds, no one approves of it more than I do. But, in seeking to further the object of that statute, we must be careful not to do injustice. When the legislature gives six months before allowing

allowing the act to come into operation, it indicates an intention to enable parties, now relying on parol promises, to sue on them effectually. The Plaintiff, for that purpose, lays his *venue* in *London*, where his cause will come to trial before the six months have elapsed; the Defendant seeks to defeat the claim by removing the cause to *Warwick*, and we should be lending ourselves to injustice if we were to assist him in his attempt.

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BURROUGH J. thought the defendant had a right to change the *venue* as a matter of course, unless the Plaintiff undertook to give material evidence in the county in which it was first laid; and that if the Plaintiff had any malpractice to complain of, he should make it the subject of a separate motion, in which the Defendant might answer his affidavits. It would lead to great inconvenience if he could, on the Defendant's motion, prevent the change of the *venue* by an affidavit which the Defendant had no opportunity of answering, and which might be all false. Upon the present occasion he proposed that the Defendant's attorney should be allowed to answer the affidavit of the Plaintiff's attorney, but was willing to concur in discharging the rule, if such affidavit should not prove to be an answer to the former.

GASELEE J. I think this rule ought to be made absolute, although I agree that the Plaintiff on shewing cause may allege other matters, besides an undertaking to give material evidence in the county where he has laid the *venue*, and that we may, where it is requisite, permit the Defendant to answer the matters in the Plaintiff's affidavit. But we are to consider the law as it now stands, and not to look at an act which is not yet come into operation; and under the law as it now stands the Plaintiff has shewn no cause why the *venue* should not be

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be changed. But, even with respect to the new law, if we were to discharge the Defendant's rule, we should, contrary to the spirit of the act, encourage suits upon every parol promise made since last *May*.

The Court then permitted the Defendant's attorney to answer the affidavit of the Plaintiff's attorney; but the answer not containing, in the opinion of the Court, an explicit denial of the language ascribed to him in the affidavit of the plaintiff's attorney, the rule was

Discharged.

Nov. 24.

**MACKLIN v. WATERHOUSE, CLENCH, and
L. O. WEEKS.**

A notice that the proprietor of a general coach-office will not be responsible for the carriage of parcels of more than 5*l.* value, unless entered as such, will not avail the proprietor of a coach who takes a parcel from the office, unless it be otherwise shewn that he is connected with the office.

2. The carrier's agent telling the female servant of the owner of a parcel above that value, that it ought to be insured, Held, not a sufficient notice of the limitation of the carrier's responsibility.

THE Plaintiff declared, that whereas he, at the special instance and request of the Defendants, had caused to be delivered to them, on, &c. at, &c., and the Defendants had then and there received into their care and custody a certain package or parcel containing divers promissory notes, for the payment of divers sums of money to bearer on demand, and divers pieces of current coin of the realm, of great value (*sc.* 49*l.*), to be safely and securely carried and conveyed by the Defendants, by a certain conveyance called the *Exeter* mail, from *Salisbury* to *London*, and at *London* to be safely and securely delivered for the Plaintiff, for certain reasonable hire and reward to the Defendants in that behalf, yet the Defendants, not regarding their duty in that behalf, did not safely or securely carry or convey, or cause to be carried or conveyed, by the said conveyance

called

called the *Exeter* mail, or in any other manner, the said package or parcel and its contents, from *Salisbury* to *London*, nor at *London* safely or securely deliver the same for the Plaintiff; but so negligently and improperly behaved and conducted themselves in the premises, that by and through the negligence, carelessness, and default of the Defendants in the premises, the package or parcel aforesaid, and its contents of the value aforesaid, became and were wholly lost to the Plaintiff, to wit, at, &c.

There was a second count in trover. Plea, not guilty.

At the trial before *Best C. J.*, *London* sittings after *Easter* term, it appeared that the Defendants were proprietors of the mail-coach running from *Exeter* through *Salisbury* to *London* :

That the Plaintiff's agent sent his female servant with a parcel containing country bank-notes and sovereigns, amounting in value to 49*l.*, to a coach-office in *Salisbury*, kept by one *Weeks* ; on the outside of which was painted "*Weeks's* mail and general coach-office : " but whether he was *Weeks*, one of the Defendants, did not appear : The servant stated, that she told the office-keeper it was a parcel of consequence ; a parcel of value, though she did not know of what value ; and the office-keeper said, he thereupon told her it must be insured. It was booked for *London*, however, and not insured.

The following notice was suspended in the office :—
" Take notice : the proprietor of this office will not be accountable for any parcel or package exceeding the value of five pounds, unless entered as such, and paid for accordingly."

The Plaintiff and his agent were aware of this notice in *Weeks's* office.

The parcel was forwarded to *London* by the Defendants' coach ; and in *London* it was, according to an admis-

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admission of one of the Defendants, stolen by a boy appointed by them to watch that and other parcels. No account was given by the Defendants of the boy's character when they took him into their service.

On the part of the Defendants, it was objected by *Wilde* Serjt. that evidence of a loss by felony did not sustain the allegation in the declaration, that the parcel was lost by negligence; especially as the Defendants were not charged as common carriers: that the statement of their contract ought to have been accompanied with a statement of the notice by which they had limited their responsibility; *Latham v. Rutley* (a): and that, at all events, the notice was sufficient to exonerate them from liability for any loss, that did not occur through gross negligence. The question on this point was reserved; and the jury, under the direction of his Lordship, found for the Plaintiff.

They found also, that there had been no negligence or concealment on his part, and that there had been negligence on the part of the Defendants.


Wilde Serjt. having, upon the foregoing objections, obtained, in *Trinity* term, a rule *nisi* to set aside this verdict and enter a nonsuit, or have a new trial instead,

Taddy Serjt. shewed cause. There is no evidence to shew that the Defendants are connected with the notice by the proprietor of *Weeks's* office; but even if it were their notice, it was matter of defence, and not a fact necessary to be mentioned in the declaration, especially upon a proceeding *in tort*, where the Defendants are charged by virtue of their common-law responsibility as carriers, and not upon the precise terms of any contract. The statement in the declaration sufficiently

(a) 2 B. & C. 20.

shews that the Defendants are sued as common carriers. In *Clarke v. Gray* (a), the Court decided, that even in *assumpsit* it was not necessary to state in the declaration against a carrier, a notice that no more than 5*l.* would be accounted for, for any goods delivered at the defendant's office, unless entered and paid for accordingly, because it formed no part of the consideration for the act, or of the entire act which was to be done in virtue of such consideration; which is all that it is necessary to state of any contract consisting of several distinct parts.

So, in *Smith v. Horne* (b), Burrough J. says, "Notice does not constitute a special contract;" "it only arises in defence of the carrier." In *Latham v. Rutley*, the action was *assumpsit*, and the omission objected to in the declaration was not the omission of a notice like the present, but an exception, in the body of the contract, of responsibility for fire or robbery. A notice, however, from the proprietor of an office, is not esteemed a notice from the proprietors of a coach. In *Garnett v. Willan* (c), where the notice would have been sufficient had not the defendants wilfully divested themselves of the care of the parcel which was lost, it was a notice from the proprietors of the public carriages, who transacted business at the office where the parcel was booked. And the Court will narrow rather than extend the exemption sought to be attained by the notice. *Beck v. Evans* (d). At all events, where the carrier receives a reward for his services, a notice will not exempt him from responsibility for losses accruing by his own negligence: *Garnett v. Willan*, *Beck v. Evans*. And felony by his servant must be esteemed the same thing as negligence in the carrier, unless he shews, which was not shewn in the present case, that he took

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(a) 6 East, 564.
 (b) 8 Taunt. 146.

(c) 5 B. & A. 53.
 (d) 16 East, 247.

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pains to ascertain the character of the servant before engaging him. In the old entries, the custom of carriers is alleged, "*absque subtractione, omissione, seu spoliatione portare tenentur.*" *Vid.* 27. 1 T. R. 29. And the same degree of responsibility is still enforced: *Brooke v. Pickwick*. (a)

Wilde. (*Spankie Serjt.* was with him.) This was the Defendants' notice, because the keeper of the office must be esteemed their agent for the reception and transmission of parcels; his contract, therefore, becomes theirs, and is clearly adopted by their receiving the parcel into their coach from his office. Had the parcel been lost or destroyed in the office, the Defendants would, but for the notice, have been responsible, as much as if the loss had happened in the coach. In *Newbond v. Just* (b), a similar notice by the proprietor of an office was held to apply to the carrier, and not to the office-keeper. If so, it ought here to have been stated in the declaration. It was an essential part of the contract, inasmuch as it entitled the Defendants to charge more for extra risk, (*per Lawrence J.* in *Harris v. Packwood* (c), *Marsh v. Horne*) (d), and, therefore, affected the consideration as much as an exception of fire or robbery. In *Clarke v. Gray*, the notice was not like the present, an essential part of the contract, but a mere limitation of damages; and in *Latham v. Rutley*, *Abbott C. J.* says, "The result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading, but if a stipulation be made, that under certain circumstances he shall not be liable at all, that must be stated." Here the Defendants stipulated not to

(a) 4 Bingh. 218.
 (b) 2 Carr. & P. 76.

(c) 3 Taunt. 264.
 (d) 5 B. & C. 322.

be liable at all, if goods above the value of 5*l.* were forwarded without being entered and paid for as such. The Plaintiff here has undertaken to state the contract, and where he does that, he must state it correctly, whether the action be *assumpsit* or case. Then, where such a notice has been given, the carrier is only liable for gross negligence; (*Nicholson v. Willan* (a), *Lowe v. Booth* (b), *Bodenham v. Bennett* (c); and the jury here have not found the negligence to be gross. Felony in the servant was not a negligence for which the Defendants were responsible; a master not being answerable even for the tortious acts of his servant, if done wilfully, and out of the course of his employment. *M^cManus v. Crickett* (d), *Croft v. Alison* (e), *Finucane v. Small*. (f)

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Cur. adv. vult.

For the judgment, see the end of the next case.

(a) 5 *East*, 507.
 (b) 13 *Price*, 329.
 (c) 4 *Price*, 31.

(d) 1 *East*, 106.
 (e) 4 *B. & A.* 590.
 (f) 1 *Esp.* 315.

RILEY and Others v. HORNE and Others.

Nov. 24.

CASE against the Defendants as common carriers, for negligence in losing goods entrusted to them to be safely conveyed by them from *Kettering* to *London*, and there to be delivered to the Plaintiffs for reward to the Defendants in that behalf. Plea, not guilty.

At the trial before *Best* C. J., *London* sittings after carriage of parcels from *A.* to *B.*, is notice that they limit it likewise

Semble, that where carriers run a coach from *A.* to *B.* and back, notice that they limit their responsibility on the from *B.* to *A.*

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Hilary term 1828, it appeared that the Plaintiffs were silk-weavers residing in *London*, and carrying on business there and at *Kettering*: that the Defendants' coach ran from the *George and Blue Boar, London*, to *Kettering* and back: that, at the *George and Blue Boar* there was a notice, that the proprietors of coaches which set out from that office would not be responsible for goods above the value of 5*l.*, unless entered as such, and paid for accordingly: that the Plaintiffs were aware of this notice, and in the habit of sending goods up and down by the Defendants' coach: that the goods in question, silks, to the value of about 46*l.*, were delivered to the Defendants by the Plaintiffs' servant, at the Defendants' office at *Kettering*, to be conveyed to *London*, and that the servant saw no such notice in the office at *Kettering*: that the goods were never delivered to the Plaintiffs.

The learned Chief Justice, thinking the notice in the office at the *George and Blue Boar*, of which the Plaintiffs were cognizant, applied only to the journey out to *Kettering*, and not to the journey back, a verdict was found for the Plaintiffs, with leave for the Defendants to move to set it aside.

Andrews Serjt. obtained a rule *nisi* accordingly, in *Easter* term, on the ground that the Plaintiffs, having an establishment at *Kettering* as well as in *London*, must be presumed to have known that the coach which came from *Kettering* was that which set out from the *George and Blue Boar*; if so, they were bound by the contents of the notice at that office. In *Mayhew v. Eames* (a), an agent employed by a commercial house in *London* to collect debts in the country, delivered a parcel containing bank-notes to a common carrier, to be forwarded to

(a) 3 B. & C. 601.

his principals in *London* : which parcel was lost. The carriers had given notice that they would not be accountable for parcels containing bank-notes. The agent had no knowledge of such notice, but the principal had. It was holden, that it was their duty to have instructed their agent not to send bank-notes by that carrier, and that the latter was not responsible.

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Wilde Serjt. shewed cause. In *Mayhew v. Eames*, the plaintiffs knew that the coach which brought their parcel from the country was the coach which started from an office in *London*, where the carrier's liability was limited by notice. There was no proof here that the Plaintiffs knew that the coach from *Kettering* was the coach which started from the *George and Blue Boar*.

Cur. adv. vult.

BEST C. J. In a state of society such as that we live in,—in which we are supplied with the necessities and conveniences of life by an interchange of the produce of the soil and industry of every part of the world,—so much property must be entrusted to carriers, that it is of great importance that the laws relating to the carriage of goods should be rendered simple and intelligible; and that they should be such as to provide for the safe conveyance of property, and at the same time protect the carrier against risks, the extent of which he cannot know, and, therefore, cannot determine what precautions are proper for his security.

Fearful of laying down any rule which might be injurious either to the public or to those most useful servants of the public, common carriers, we thought it right to avail ourselves of the leisure afforded us by the long vacation, to consider of the cases of *Riley v. Horne* and *Macklin v. Waterhouse*.

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When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves.

To give due security to property, the law has added to that responsibility of a carrier, which immediately rises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer.

From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not—namely, the act of God and the King's enemies.

As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents against which no care on the part of the carrier can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination, as for the labour and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey is more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a stronger and more vigilant guard is required than when he carries articles not easily removed, and which offer less temptation to dishonesty. He *must* take what is offered to him to carry to the place to which

which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him.

By means of negociable bills, immense value is now compressed into a very small compass. Parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust if it did not afford them the means of knowing the extent of their risk. Other insurers (whether they divide the risk, which they generally do, amongst several different persons, or one insurer undertakes for the insurance of the whole,) always have the amount of what they are to answer for specified in the policy of insurance.

If the extent of risk is ascertained in cases in which persons are not obliged to insure, and if they do insure may fix their own rate of premium, there is greater reason for ascertaining it where one is compelled to become an insurer, and can only charge what the magistrates in sessions, if they think proper to settle the rates of carriage, will allow under the statute of *William and Mary*, and where no such rates are made, what a jury shall think reasonable. It would be inconvenient, perhaps impossible, to have a formal contract made for the carriage of every parcel in which the value of the parcel should be specified, as well as the price to be paid for the carriage. But it would add very little to the labour of the book-keeper if he entered the value of each package, and gave the person who brought it a written memorandum of such entry, like the slips now made on an agreement for a policy of insurance.

The giving of such memorandums would entirely put an end to the litigation which the notices of carriers now give occasion to, and would make the practice of carriers, as nearly as circumstances will permit, conformable to that of all other insurers. Perhaps such

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memoranda might bring the parties within the reach of the stamp laws; and the apprehension of this may have prevented carriers from adopting a practice so effectual for their security, and have driven them to the expedient of giving notices that they will not be answerable beyond a certain sum, unless the parcels are entered and paid for as parcels of value.

In *Batson v. Donovan* (a), the Court of King's Bench considered a notice of this sort, the knowledge of which was brought home to the party sending goods, as equivalent to a request on the part of the carrier to know the value, and that it made it the duty of the owner of the goods to apprise the carrier that the parcel was of value.

The legislature would probably think, if its attention were called to the subject, that a stamp-duty on contracts relative to inland carriage would be a very heavy and very inconvenient tax, and would remove the objection to written evidence of such contracts.

A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value. It is the interest of the owner of goods to give a true account of their value to a carrier, as in the event of a loss he cannot recover more than the amount of what he has told the carrier they were worth; and he cannot recover more than their real worth, whatever value he may have put on them when he delivered them to the carrier.

It was decided in *Gibbons v. Paynton* (b), that any artifice made use of to induce a carrier to think that a parcel of jewellery contained only things of small value,

(a) 4 B. & A. 21.

(b) 4 Burr. 2298.

would

would prevent the owner from recovering for the loss of his parcel.

In *Kenrigg v. Eggleston* (a), it was held that the owner was not required to state all the contents of the parcel, but it was for the carriers to make a special acceptance. In *Tyly and Others v. Morrice* (b), in which the preceding case is recognized and confirmed, it is said that the true principle is, that the carrier is only liable for what he is fairly told of. In *Titchburne v. White* (c), it was determined that a carrier is answerable for money, although he was not told that the box delivered to him contained any money, unless he was told that the box did *not* contain money, or he accepted it *on the condition* that it did not contain money.

It may be collected from these authorities that it is the duty of the carrier to enquire of the owner as to the value of his goods, and if he neglects to make such enquiry, or to make a special acceptance, and cannot prove knowledge of a notice limiting his responsibility, he is responsible for the full value of the goods, however great it may be. This is a convenient rule; it imposes no difficulty on the carrier. He knows his own business, and the laws relative to it. Many persons who have occasion to send their goods by carriers, are entirely ignorant of what they ought to do to insure their goods. Justice and policy require that the carriers should be obliged to tell them what they should do.

Although a carrier may prove that the owner of goods knew that the carrier had limited his responsibility by a sufficient notice, yet, if a loss be occasioned by gross negligence, the notice will not protect him. Every man that undertakes for a reward to do any service, obliges himself to use due diligence in the performance of that service. Independently of his respon-

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(a) *Al.* 93.

(b) *Cartb.* 485.

(c) *Str.* 145.

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sibility as an insurer, a carrier is liable for gross negligence. This point is settled by *Sleat v. Fagg* (a), *Wright v. Snell* (b), *Birkett v. Willan* (c), *Beck v. Evans* (d), and *Bodenham v. Bennett*. (c)

The jury are to decide what is gross negligence. We may, however, observe, that the most anxiously-attentive person may slip into inadvertence or want of caution. Such a slip would be negligence, but not such a degree of negligence as would deprive a carrier of the protection of his notice. The notice will protect him, unless the jury think that no prudent person, having the care of an important concern of his own, would have conducted himself with so much inattention or want of prudence as the carrier has been guilty of.

If a notice touching the responsibility of the carrier be given, it matters not by whom it is given, or in what form, if it tells the owner of the goods that the carrier by whom he proposes to send them will not undertake for their safe conveyance, unless paid a premium proportioned to their value.

We have established these points, — that a carrier is an insurer of the goods which he carries; that he is obliged for a reasonable reward to carry any goods to the place to which he professes to carry goods that are offered him, if his carriage will hold them, and he is informed of their quality and value; that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are; that if he does not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount, whatever that may be; that he may limit his responsibility as an insurer, by

(a) 5 B. & A. 342.

(b) *Id.* 350.

(c) 2 B. & A. 356.

(d) 16 East, 244.

(e) 4 Price, 31.

notice;

notice; but that a notice will not protect him against the consequences of a loss by gross negligence.

Let us see how these principles bear on the two cases now under our consideration.

In *Macklin v. Waterhouse* the notice was in these words: "Take notice, that the *proprietor of this office* will not be answerable for any parcels or package above the value of 5*l.*, unless entered as such and paid for accordingly." A Mr. *Weeks* was the keeper of this office, at which parcels were received and booked for several coaches, belonging to different proprietors. No evidence was given that *Weeks*, the proprietor of the office, was the same *Weeks* who was one of the defendants, or that the plaintiff or his agent knew that the office-keeper had any interest in this coach.

No one can collect from the notice that the proprietor of the office has any thing to do with any of the coaches that take parcels from that office. If he had by his notice told those who had occasion to go to his office, that none of the proprietors of coaches who took parcels from it would be responsible, such a notice would have been sufficient. The persons who carry parcels to coach-offices are generally servants, and other persons who cannot have much knowledge of matters of this sort. The notice should be plain and easily understood by such persons. They are not to be required to determine whether a notice given by the keeper of a coach-office must apply to the risks undertaken by all the coach-proprietors whose coaches are loaded from that office. This is a case without a sufficient notice, and the Defendants are subject to the unlimited responsibility of common carriers. It is not necessary to decide in this case whether, if it had been known that *Weeks* was a proprietor of the coach, a notice given as a proprietor of the office, could form a special condition his contract as a coach-proprietor.

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... was made at the trial, that ... should have been stated in the ... was no sufficient notice, it is ... no notice.

... as the declaration stated, that the loss ... negligence of the Defendant, and that ... any negligence. Probably not sufficient gross negligence. But, as there was no ... of loss by negligence is not a material ... no proof of it was necessary. If, however, ... such allegation was necessary, a loss, the ... which is not shewn, is sufficient evidence of ... negligence, although not of gross negligence.

... the book-keeper deposed to a conversation with the ... who brought the parcel, which this servant did not ...; but merely said, that she did not recollect it. ... was not considered at the trial that what passed in this conversation limited the responsibility of the defendant. ... did not, therefore, put it to the jury to say whether they believed that a conversation to the effect deposed to had passed. The book-keeper swore, that the woman who brought the parcel said, "that it was a parcel of consequence." That he asked her if it was a parcel of value: she said that it was, but that she did not know what its value was. The book-keeper told her it "ought to be insured." These were the words used by the witness. To talk of insurance to a country servant was not the way to inform her what it was proper for her to do. This agent of the defendants' should have told her, when she said she did not know the value of the parcel, to go back to her master and ask him what the value of his parcel was, that the agent might know what to charge him for the carriage of it; and that, until he knew the risk which his employers were to be answerable for, he would not take charge of the parcel. Instead of this, he takes it and it is lost, and it was the only

only parcel that was lost. That I might conform to the opinion of the majority of the Court in *Batson v. Donovan*, I asked the jury whether the agent of the Plaintiff had been guilty of any negligence, or failed in her duty to the carriers. They answered in the negative, and I think their answer was the proper one. As the carrier took the parcel without requiring to know its value, and without insisting that it should be entered and paid for according to its value, he took it without any limitation of his common-law responsibility, and must be answerable for its loss.

It is unnecessary for us to decide whether the entrusting valuable property to a servant, of whom the carrier chose to give no account at the trial, was sufficient to authorize the jury to find that the carrier had been guilty of that degree of negligence which would deprive him of the protection of a proper notice.

In *Riley v. Horne* I was of opinion, at the trial, that the notice did not apply to the journey to *London*. The Court of King's Bench has determined, that such a notice applies to the journey back as well as to the journey out.

A carriage that returns to a place must have gone from it, and, therefore, a notice from the proprietors of coaches going from a place may be applied to their return journey.

But to give effect to such a notice in the present instance it must be proved that the person who sent goods on that same journey knew that the coach came from the *George and Blue Boar* in *London*. In this case, the Plaintiffs had establishments in the country and in *London*, and were constantly in the habit of sending parcels from *London* to the country, and from the country to *London* by this coach. It is most probable, therefore, that the jury would have found that the Plaintiffs knew that the carriage came from the *George and Blue Boar*, and that this notice applied to its journey out and home. As I thought

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thought that the notice was not so plain and direct as it ought to have been, I did not, therefore, leave it to the jury to say, whether the Plaintiffs knew that the coach was one that started from the *George and Blue Boar*.

There ought to be a new trial in this case, that this question may be put to the jury.

In *Macklin v. Waterhouse*, the rule must be discharged, and in *Riley v. Horne* there must be a new trial.

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LANGSTON v. POLE and Others.

Devise to
J. H. L. (de-
visor's eldest
son) for life ;
remainder to
trustees to
preserve, &c. ;
remainder to
J. H. L.'s se-
cond, third,
fourth, fifth,
and all and
every other
the son and
sons of the

THE following case was sent from the Court of Chan-
cery for the opinion of this Court : —

John Langston, Esq. was at the time of making his will hereinafter mentioned, and at the time of his death, seised in fee-simple of divers manors, messuages, lands, tenements, and hereditaments situated in the counties of *Oxford* and *Middlesex* ; and duly made and published his last will and testament in writing, bearing date the 28th day of *July* 1801, which was executed and attested in manner by law required to pass freehold estates by

body of *J. H. L.* severally and successively in seniority of age in tail male ; remainder to devisor's second and other sons successively in tail male ; remainder to first and other daughters of the body of *J. H. L.* successively in tail general ; remainder to devisor's eldest daughter, *M. S. L.*, for life ; remainder to trustees to preserve, &c. ; remainder to her first and other sons successively in tail male ; remainder to her first and other daughters successively in tail general ; like remainders for life (with remainder to trustees to preserve, &c.) to devisor's other daughters successively, with like remainders in tail to their respective children ; remainder to devisor's sister in fee ; various terms to trustees to raise money ; and a power to the party in possession of the premises devised, to charge them for the portions and maintenance of younger children, male and female, accompanied with a provision, that in case of any younger child's obtaining a portion, and afterwards becoming entitled to the premises devised, the portion of such younger child should go over to the other younger children : Held, that the eldest son of *J. H. L.* took an estate tail in the premises expectant on the death of *J. H. L.*

devise,

devise, and he thereby gave and devised all his manors, messuages, farms, lands, tenements, and hereditaments situated and being in the several counties of *Oxford* and *Middlesex* or elsewhere in *England* (except his shares in the *New River Company*), unto *John Pollexfen Bastard*, Esq., *John William Hope*, Esq., and *Charles Morice Pole*, Esq. (now *Sir Charles Morice Pole*, Bart.), their heirs and assigns, to the uses after mentioned; (that is to say,) to the use of the said testator's son, the said Plaintiff, *James Houghton Langston*, for and during the term of his natural life, without impeachment of waste; — and from and after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of certain trustees therein named, and their heirs during the life of the said Plaintiff, in trust, by the usual ways and means to preserve the contingent uses and estates thereafter limited; — with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of the said Plaintiff lawfully to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age or priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body to be always preferred, and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing; — with remainder to the use of the said testator's second and other sons successively in tail male; — with remainder to the use of certain other trustees therein named, their executors, administrators, and assigns, for the term of 500 years upon the trusts and for the interests and purposes thereafter mentioned; — with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said Plaintiff lawfully to be begotten, severally, successively, and in remainder one after another

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other as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters, and the heirs of her body to be always preferred and to take before the younger of such daughter and daughters, and the heirs of her and their body and bodies issuing; — and for default of such issue, to the use of other trustees therein named, their executors, administrators, and assigns for and during the term of ninety-nine years, upon the trusts and for the intents and purposes thereafter mentioned; — with remainder to the use of the said *testator's* eldest daughter *Maria Sarah Langston*, and her assigns for and during the term of her natural life, without impeachment of waste; — and from and after the determination of that estate by forfeiture in her lifetime, to the use of the trustees thereafter named for preserving contingent remainders and their heirs during the life of her the said testator's said daughter, in trust by the usual ways and means to preserve the contingent uses and estates thereafter limited; — with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the body of her the said testator's said daughter lawfully to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body to be always preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing; — and for default of such issue, to the use of other trustees therein named, their executors, administrators, and assigns for the term of 600 years, upon the trusts and for the intents and purposes thereafter mentioned;

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mentioned; — with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of her the said testator's said daughter *Maria-Sarah* lawfully to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters and the heirs of her body to be always preferred, and to take before the younger of such daughter and daughters and the heirs of her and their body and bodies issuing; — and for default of such issue, like remainders with like attendant terms to testator's daughters *Elizabeth-Catharine, Caroline, Agatha-Maria-Sophia, Henrietta-Maria*, and their issue respectively; — remainder to sixth and other daughters thereafter to be born, successively in tail general; — remainder to trustees for term of 1500 years on trusts thereafter mentioned; — remainder to the use of testator's sister, *Sarah*, the wife of *Peter Cazalet*, her heirs and assigns for ever:

And the said testator by his said will did declare that as for and concerning the said term of 500 years by his said will limited as aforesaid, the same term was limited unto the said trustees thereof, their executors, administrators, and assigns, upon trust that in case there should be no son of the body of the said Plaintiff, *James Houghton Langston*, nor any future son of his the said testator's own body, or there being any such son or sons if he and they should all die without issue male before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of his (the said testator's) said son, the said Plaintiff, *James Houghton Langston*, then they the same trustees and the survivor of them, and the executors, administrators, and assigns of such survivor should, after the decease of his (the said testator's) said son, the said Plaintiff,

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Plaintiff, *James Houghton Langston*, and such failure of issue male of his body, and of his the said testator's own body as aforesaid, by mortgage or sale or other disposition of all or any part of the premises comprised in the said term of 500 years, or by the rents and profits thereof, or by any other ways or means whatsoever, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters (*other than and besides an eldest or only daughter*), as thereafter mentioned; (that is to say,) in case there should be but one such daughter, not being an eldest or only daughter, the full sum of 20,000*l.* for the portion of such one daughter to be paid to such one daughter at the age of twenty-one years or day of marriage, which should first happen after the commencement of the said term of 500 years in possession; but if such only daughter should have attained such age or be married before such commencement, then to be paid to her immediately after such commencement: And if there should be two or more such younger daughters, then the sum of 40,000*l.* for the portions of such two or more of them, and to be paid and divided unto or between and among them, or any one or more of them, and to be payable at such days or times and in such parts, shares, and proportions, and subject to such provisos, conditions, and limitations over (such limitations over to be for the benefit of some or one of them), as he the said Plaintiff, *James Houghton Langston*, at any time or times during his life, by any writing or writings with or without power of revocation and new appointment, sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any codicil thereto, signed in the presence of and attested by three or more credible witnesses, should direct or appoint; and for want of such direction or appointment, to be paid to such two or more younger daughters,

ters, and to be shared and divided between and among them, and in equal parts, shares, and proportions, share and share alike :

Then, after specifying the times and mode of payment, it was provided always, that if any such younger daughter should depart this life, *or become an eldest daughter, and as such become entitled in possession to the said manors*, and other hereditaments therein-before devised, before she should attain her age of twenty-one years, or be married, or before such other time or times as should or might be appointed for the payment of her or their portion or portions as aforesaid, *the portion or sum of money provided for each such daughter or daughters so dying or becoming an eldest daughter, should from time to time go and accrue to the survivors or survivor, and others or other of the said younger daughters, and should be equally divided between such survivors or others of them (if more than one) share and share alike, and the same should be paid and payable at such respective days and times, and should go in the same manner to such surviving and other daughter and daughters as thereby provided and declared, touching their original portion or portions : and in case of the death of any other or others of the said daughters, or if any other or others of them should become an eldest daughter, and entitled as aforesaid, before she or they should have attained such ages or times as aforesaid, then all and every such accruing or surviving share and shares should, from time to time, again be subject and liable to such further right, chance, contingency, or condition of accruer or survivorship to the survivors and survivor, and others and other of the said younger daughters as therein-before declared, touching her or their original portion or portions ; provided, nevertheless, that if the said younger daughters should be reduced to one, there should not be raised for the portion of such one younger daughter, by reason of any*
such

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such survivorship, any sum or sums that would in the whole exceed the principal sum of 20,000*l*.

Then followed provisions for the maintenance and education of the younger daughters out of the interest of the money to be raised :

And as to, for, and concerning the said term of ninety-nine years therein-before limited to trustees, he, the said testator, thereby declared that the same term was limited unto them, their executors, administrators, and assigns, upon trust that in case there should be no son or daughter of the body of him the said Plaintiff, *James Houghton Langston*, nor any future son of the said testator's body, or there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain his, her, or their age or ages of twenty-one years, then they, the same trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the decease of the said plaintiff, *James Houghton Langston*, and such failure of issue as aforesaid, by mortgage or sale, or other disposition of all or any part of the hereditaments comprised in the said term of ninety-nine years, or by the rents and profits thereof, or by any other ways and means levy and raise for the use and benefit of each of the said testator's youngest daughters, *Elizabeth-Catharine*, *Caroline*, *Agatha-Maria-Sophia*, and *Henrietta-Maria* respectively, or such of them as should not from time to time be in the actual possession of, or entitled to, the said hereditaments, under and by virtue of the limitations contained in the said will, for and during the term of their respective natural lives, an annuity or yearly sum of 500*l*., clear of all deductions, and should pay the same unto them, the said testator's said youngest daughters respectively, or their respective assigns, by equal half-yearly payments, on the 25th day of

of

of *March*, and 29th day of *September* in every year, and should make the first payment thereof on such of the said days as should next happen after the commencement of the said term of ninety-nine years in possession: provided further, that in case there should be no son or daughter of the body of her, the said testator's said daughter, *Maria-Sarah*, or there being any such son or sons, daughter or daughters, if all and every of such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain the age of twenty-one years, and if the said testator's said youngest daughters, *Caroline*, *Agatha-Maria-Sophia*, and *Henrietta-Maria*, or any of them, should be then living, then upon trust that they, the same trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should after the several deceases of the said plaintiff, *James Houghton Langston*, and the said testator's daughter, *Maria-Sarah*, and failure of all such issue as aforesaid, by the ways and means aforesaid, levy and raise for the use and benefit of each of them the said testator's said three youngest daughters, *Caroline*, *Agatha-Maria-Sophia*, and *Henrietta-Maria* respectively, or such of them as should not from time to time be in the actual possession of or entitled to the said manors and other hereditaments, under and by virtue of the limitations contained in the said will, for and during the term of their respective natural lives, a yearly sum of 300*l.*, clear of all taxes and deductions whatsoever, over and above the said annuity or clear yearly sum of 500*l.* therein-before provided for each of them, the said testator's said youngest daughters, and should pay the same unto them, the said testator's said three youngest daughters respectively, or their respective assigns, by equal half-yearly payments on such days and times, and

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together with the said annuities or clear yearly sums of 500*l.*, therein-before provided for each such youngest daughter, and in manner therein-before directed touching the said respective annuities of 500*l.* ; provided further, that *in case any of them, his said youngest daughters, for whom annuities were therein-before provided, should become entitled in possession to the said manors and other hereditaments therein-before devised, by virtue of the limitations contained in the said will, then and in such case, and from thenceforth, the said annuities or clear yearly sums therein-before provided for such daughter or daughters respectively, so becoming entitled as aforesaid, should cease, determine, and be no longer paid or payable: provided further, that after payment of the several annuities therein-before provided for his said youngest daughters, and all arrears thereof respectively, the residue and overplus of the rents and profits (if any) should be had and received by the person and persons respectively, who, for the time being, should be next entitled to the reversion or the remainder of the said premises immediately expectant on the determination of the said term of ninety-nine years, to and for her and their own use and benefit.*


There were declarations of trusts similar to those of the term for 500 years, upon five other terms, one for each of the testator's five daughters, in case there should be no son or daughter of the body of the Plaintiff, nor any future son of the testator's body, or there being any such son or sons, daughter or daughters, if all and every such son and sons should die without issue male, and all and every such daughter and daughters should die without issue before any of them should attain twenty-one; and in case there should be no son of the body of the daughter to whom the term related; or there being any such son or sons, if he and they should die without issue male before twenty-one, and there should be two
 or

or more daughters of the body of the daughter to whom the term related.

Under a sixth term, trustees were to raise 80,000*l.* for the testator's sister *Mary-Ann*, wife of *George Arnold*, and his nephew *Houghton Okeover*, in case there should be no son or daughter of all the testator's children, nor any future son or daughter of the testator's body, or, there being such, all should die without issue before they attained the age of twenty-one.

The Plaintiff was empowered to jointure.

And the said testator thereby also provided and directed, that it should be lawful for the said Plaintiff, from time to time, during his natural life, in case there should be any child or children of his body lawfully begotten, *other than and besides an eldest or only son*, by any deed or deeds, instrument or instruments in writing, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, sealed, and published in the presence of, and attested by, three or more credible witnesses, *to charge all or any part of the said manors, messuages, farms, lands, tenements, tithes, and hereditaments therein-before devised with and for the raising and payment of any principal sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of the younger son or sons, or daughter or daughters of the body of him the said Plaintiff*, lawfully to be begotten, born in his lifetime, or within due time after his decease, to be paid and payable unto, and to vest in such younger son or sons, or daughter or daughters respectively, at such time or times, and in such shares and proportions, with such clauses of survivorship, and in such manner as he the said Plaintiff should by such deed or deeds, instrument or instruments in writing, or

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last will and testament, and to be executed and attested as aforesaid, direct, limit, and appoint: and also to charge the same premises, or any part thereof, with or for the payment of any sum or sums of money yearly or otherwise, as he should think fit, for the maintenance of such younger son or sons, or daughter or daughters from the time of his death until such portion or portions respectively should become payable, not exceeding the interest of such portions after the rate of *4l. per cent. per annum*.

And the said testator thereby further willed and directed, that in like manner it should be lawful for each of them his said daughters therein-before named, to whom estates for life in his said devised estates were therein-before limited, when and as they should respectively be in the actual possession of his said devised estates, in case there should be any child or children of their respective bodies lawfully begotten, *other than and besides an eldest or only son*, by any such or the like deed or deeds, instrument or instruments in writing, to be executed and attested as aforesaid, or by their respective last wills and testaments, or any writing or writings of appointment in the nature thereof, to be signed, sealed, and published as aforesaid, to charge all or any part of the said devised estates, with and for the raising and payment of any sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of their respective younger children: with the like power of providing maintenance, and limiting a term of years for raising the said portion or portions and maintenance, and in such and the like manner, to all intents and purposes, as therein-before directed with respect to the portion or portions of the younger son and sons, and daughter and daughters of the said Plaintiff, *James Houghton Langston*. And the said testator, by his said will, gave all the residue of his personal estate to the
said

said Plaintiff if and when he should attain the age of twenty-one years; but if he should die under that age, leaving a child or children, then to such child, or, if more than one, to such children equally: but if the said Plaintiff should die under the age of twenty-one years, and there should be no son or daughter of his body living at the time of his death, then to the said testator's said daughters equally.

The said *John Langston*, the testator, departed this life in *February* 1812, leaving the said Plaintiff, *James Houghton Langston*, his only son and heir-at-law (then a minor and a bachelor), and the said testator's said several daughters him surviving, having previously made three codicils to his said will, but none of them in any manner affecting the above-mentioned limitations of his estate.


The said Plaintiff, *James Houghton Langston*, attained the age of twenty-one years in *May* 1817, and has since that time intermarried, and has issue by his wife two sons, *viz.* *Henry Langston*, his eldest son, and *Edward Langston*, his second son.

The testator had no son other than the said Plaintiff at or after the date of the said will.

The question for the opinion of the Court was, Whether the said *Henry Langston*, the first son of the said testator's son, the said *James Houghton Langston*, takes any and what estate under the said will?

Taddy Serjt. The Plaintiff's elder son *Henry* takes an estate tail, and that, either under the literal construction of this will, or according to the intention of the devisor, manifestly expressed in its various provisions.

First, under the literal construction. Estates tail are given to the Plaintiff's second, third, fourth, fifth, and all and every other the son and sons of his body, severally,

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rally, successively, and in remainder one after the other as they should be in seniority of age and priority of birth. If the elder son does not take the property, and take it first, the words “*all* and every the sons as they shall be in seniority of age” will be without operation; for it must be observed that the expression is, “all and every other *the sons*,” and not, “all and every other the *younger sons*.”

Then, the whole will is manifestly framed upon the supposition that the Plaintiff’s elder son was to be in possession of the estate. Provision is made for all the Plaintiff’s younger children, and even for the devisor’s daughters, and the 25,000*l.* which the Plaintiff, or the devisor’s daughters in case they should succeed to the estate, are empowered to raise, is only to be raised in case there should be any child or children of their bodies, *other* than an elder or only son, and to be distributed among their *younger* children. But as the case stands at present, the Plaintiff’s second son will have the 25,000*l.*, and the landed estate too, while the Plaintiff’s elder son and his children will, unless he take the land under this devise, be left destitute.

Where the intention has been clear, the Courts have gone much farther than is requisite upon the present occasion, to give effect to such intention. In *Clements v. Paske*, cited in *Doe v. Hallett (a)*, upon a devise to *A.* for life, and, after his decease, to the first and eldest son of the body of his (the testator’s) nephew, lawfully issuing or issued, and for default of such issue, then likewise to the second, third, and every other son of his nephew successively, and in remainder one after another as they should be in seniority of age, and the several and respective heirs male of the body of every such second, third, and every other son or sons,* the eldest of such

(a) 1 M. & S. 130.

sons and the heirs male of his body being always preferred before the younger, it was decided that the nephew took an estate tail by implication, in order to effectuate the general intent, and let in the descendants of the first son. So, in *Doe v. Hallett*, upon a devise to the use of *A.*, *only surviving son of J. S.*, for life, and to his first and other sons, &c., and for default of such issue, to the use of the first, second, and of all and every other son and sons of *J. S.*, lawfully to *be begotten*, and the heirs male of the body of such first and other sons, with proviso that the said *A.* and his first and other sons, and also the first and other sons *thereafter to be born* of the said *J. S.*, should reside at the family-house, &c. it was held, that the second son of *J. S.*, born before the date of the will, should take upon the death of *A.* without issue. In *Duke v. Doidge (a)*, a younger son was permitted to take as an elder, and in *Beale v. Beale (b)*, an elder daughter, where there was a son, was permitted to take as a younger child.

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Wilde Serjt. contra. The Plaintiff's elder son takes no estate, or if any, takes it after the fifth son.

Nothing can be collected as to the deviser's general intention, for the will is altogether capricious, and not drawn up on any usual or consistent plan. For example, a larger estate is given to the daughters of daughters than to the sons of daughters; and the daughters of daughters take before the daughters of sons. The language of the will, however, is perfectly clear, there is no ambiguity latent or patent, and the Court must give effect to the words as they stand. There is nothing in the will to lead the Court to suppose that the Plaintiff's elder son was not designedly omitted; as for instance, on the ground that family set-

(a) 2 *Ves.* 203. n.

(b) 1 *P. Wms.* 245.

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lements existed, securing him a fortune from some other quarter. In *Doe v. Hallett* there was a latent ambiguity, and in *Clements v. Paske*, the nephew took an estate tail in order to effectuate the deviser's general intent; but an estate can only be implied in the absence of an express provision, or where there is any ambiguity; and though the Court may by implication extend an estate, they cannot insert the name of an individual expressly omitted by the deviser.

But, at all events, the Plaintiff's elder son can only take after the fifth. The words *severally and successively as they shall be in seniority of age*, cannot apply to the second, third, fourth, and fifth sons, because their order of succession is previously and precisely designated; it can only apply, therefore, to all and every the sons other than the second, third, fourth, and fifth.

Cur. adv. vult.

The following certificate was afterwards given :

We have heard this case argued by counsel, and have considered the same, and are of opinion that the said *Henry Langston*, the first son of the testator's son the said *James Houghton Langston*, takes an estate in tail-male under the said will, expectant on the death of his father the said *James Houghton Langston*.

W. D. BEST.

J. A. PARK.

J. BURROUGH.

S. GASELEE.

28th November 1828.

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RAGGETT v. BEATY.

Nov. 25.

THIS was a case directed by the Master of the Rolls for the opinion of the Court of Common Pleas on the hearing of a cause instituted by the assignees of *George Blair*, a bankrupt, to compel the specific performance of an agreement entered into by the Defendant for the purchase of an estate sold under the commission.

The property was devised to the bankrupt by the will of his great-uncle *George Blair* deceased, which was as follows :—

“ I, *George Blair*, of *Milholm*, in the parish of *Stapleton*, in the county of *Cumberland*, do make this my last will and testament in manner and form following: (that is to say,) Whereas in and by declaration of trust made between my nephew *John Blair*, of *Greensburn*, and me, bearing date the first day of *March* 1766, touching and concerning all my messuage and tenement, situate, lying, and being at *Souter Moor* otherwise *Milholm*, in the said parish of *Stapleton*, in the county aforesaid, it is, amongst other things, declared in trust, that he the said *J. Blair* or his heirs do and shall convey, assign, and surrender the said messuage and tenement, with all and every the appurtenances, unto such person and persons, and for such estate, uses, intents, and purposes, and in such parts, manner, and form, with or without power of revocation as I, the said *George Blair*, shall from time to time, by any writing or writings, or by my last will and testament in writing, or any writing purporting to be my last will and testament, to be by me

Devise, that *J. B.*, a trustee for devisor, shall grant the premises to *J. B.*'s son *G. B.*, to enter on after the death of *J. B.*, and that *J. B.* and *G. B.* shall within one month after devisor's decease pay 100*l.* to *W. T.* and *T. B.* to discharge legacies, and if they omit to do so, that *W. T.* and *T. B.* shall let the premises and raise the 100*l.* out of the rent, they keeping the deeds of the premises, and not allowing *J. B.* and *G. B.* to sell or mortgage till the legacies be paid and *G. B.* be twenty-one years of age; and that if *G. B.* die and leave no child

lawfully begotten of his own body, *W. T.* and *T. B.* shall sell the premises and divide the proceeds among brothers, &c. : Held, an estate tail in *G. B.*

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made and published in the presence of three or more credible witnesses, direct, limit, or appoint, give, devise, or assign the same; now it is my will, and I do hereby order, that he, my said nephew, *John Blair* give, grant, and assign the said premises to his second son *George Blair*, to enter upon and possess the same after the decease of his father the said *J. Blair*. And I do further order and direct, that the said *J. Blair* and *George Blair* shall and will pay or cause to be paid, within one year next after my decease, 100*l.* of lawful money into the hands of my trusty and well-beloved friends *William Taylor*, of *Hetherside*, in the parish of *Kirkclinton* and county of *Cumberland*, yeoman, and *Thomas Blair*, of *Barclose*, in the parish of *Scaleby* and county aforesaid, yeoman, for them to discharge and pay the legacies hereinafter bequeathed. But if, and in case the said *John Blair* and *George Blair* do not pay the said sum of 100*l.* within the time limited, it is my will, and I do hereby order, that the said *W. Taylor* and *Thomas Blair* do let the said messuage and tenement, and receive the rents arising from the same until the said 100*l.* be paid, they keeping possession of all the deeds of the estate, and not allowing the said *J. Blair* and *G. Blair* either to sell or mortgage any part of the premises until the legacies be all paid, and *G. Blair* be twenty-one years of age; or if, and in case the said *G. Blair* die and leave no child lawfully begotten of his own body, it is my will that the said *W. Taylor* and *T. Blair*, their heirs and assigns, do sell the said messuage and tenement, and distribute the money arising from such sale amongst his brothers and sisters and *Jonathan Blair* and *Hannah Todd*, or their heirs, in such share or shares as they the said trustees shall think proper."

The question for the opinion of the Court of Common Pleas was, What estate and interest, under this will, *George Blair*, the bankrupt, the son of *John Blair*, had in the said premises upon the death of his father *John Blair*?

Wilde

Wilde Serjt. The bankrupt took an estate-tail under the will of the testator ; with a contingent remainder over to the trustees named in the will, upon failure of issue by *G. Blair*. The rule of law is clear, that if a limitation can take effect as a remainder, it shall not operate as an executory devise ; *Purefoy v. Rogers* (a), *Walter v. Drew* (b), *Goodtitle v. Billington* (c); and the language of this will is sufficient to create an estate-tail with a contingent remainder over. The words “in case the said *George Blair* die and leave no child lawfully begotten of his own body,” allude to an ultimate indefinite failure of issue of *G. Blair*, and not to the failure of his immediate offspring at the time of his death. The rule to be extracted from the decisions on this subject is, that where lands of inheritance are devised to one, or to one and his heirs, and if he die without issue (or any words to that effect), then over, the latter words are supposed to be inserted in favour of the issue, and they either reduce or enlarge the estate previously given, to an estate-tail.

The expressions, “if he die without issue,” or “if he die and leave no issue,” or “leave no issue of his body,” or “leave no child or children,” or “die without leaving any child or issue lawfully begotten or to be begotten ;” have all been decided to intend an indefinite failure of issue, and, consequently, to give an estate-tail. If the words had been, “in case the said *George Blair* die and leave no children lawfully begotten of his own body, living at his death,” they must have been construed as alluding to a failure of *George Blair*’s immediate offspring at his decease, and he would then have taken an estate in fee with an executory devise over ; but as there are no words that can fairly be construed to restrain the event of the failure of his issue, to the

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(a) 2 Saund. 380.

(b) 1 Com. 372.

(c) Dougl. 758.

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period of the death of *George Blair*, the devise must be considered as giving him an estate-tail general, with remainder over in case of an ultimate indefinite failure of his issue : *Walter v. Drew*. In *Dansey v. Griffith* (a), *Richard Dansey*, the plaintiff's father, being seised in fee, devised to his eldest son *D. R. Dansey*, and his heirs for ever, all his estates, lands, &c., and all his personal property, to enable him to pay all his debts and legacies ; but if it should so happen that his eldest son *D. R. Dansey* should die and leave no issue, then he gave all his aforesaid estates and lands, &c. unto his son *William Dansey* and his heirs ; and if he should die without issue, then to his son *E. C. Dansey* ; and in the like case to his son *S. Dansey* ; and in failure of issue from him, to the eldest surviving son of his sister *Mary Johnson*, and his heirs, &c. The Court were of opinion that *D. R. Dansey* took an estate in tail general. So, in *Forth v. Chapman* (b), where a testator, being possessed of a term, devised it to *A.* and *B.*, and if either of them should depart this life and leave no issue of their respective bodies, then to *C.*, it was held that these words, if used in a devise of freehold property, would imply an indefinite failure of issue : and this is confirmed by *Tenny v. Agar*. (c)


In all the cases where words like the present have received a different construction, that construction has been adopted, because the other provisions of the will were such, that the testator's intention could not be carried into effect in any other way. But giving *George Blair* an estate-tail, and the trustees a contingent remainder, will not in any way defeat the testator's intentions ; for it is not necessary that executors or trustees should take in fee, unless they have charges which they could not defray with a less estate ; here the

(a) 4 M. & S. 61.

(b) 1 P. W. 663.

(c) 12 East, 253.

charge of the debts and legacies might be defrayed out of a less estate: the devisees were, indeed, to be prevented from selling if they did not pay; but that must mean, if they did not pay out of the rents, as the trustees were to do in case of their omission. Such a charge would not prevent the estate from being an estate-tail. *Dutton v. Engram*(a), *Denn v. Slater*.(b) In *Goodtitle v. Maddern*(c), the charge was on the person of the devisee. The provision that the trustees shall hold the title-deeds, and prevent *George Blair* from selling till he attains twenty-one, is not incompatible with a devise of an estate-tail.

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Cross Serjt. contra. *George Blair* took an estate in fee with an executory devise over, in fee, to *William Taylor* and *Thomas Blair*. This is the testator's intention, as it is to be collected from the whole will. The circumstance of his restraining the sale of the estate till 100*l.* should have been paid, and *George Blair* should have attained twenty-one, shews that, subject to that restriction, he intended that *John* and *George Blair* together, or *George Blair* as survivor, should have the ability to sell the estate; but this they would not have unless *George Blair* took a fee. This construction is further borne out by the circumstance, that no interest in the property is limited to any one after *George Blair*, for the trustees take a power only, and not an interest. But, at all events, as *George Blair* was not to have the absolute disposal of the land till he had paid the 100*l.* mentioned in the will, and as the will is imperative on that head (*shall and do pay 100*l.**), the payment must be taken as the condition of the devise, and a devise on payment of a sum in gross has always been holden to pass a fee. *Collier's case* (d), *Wellock v. Hamond* (e),

(a) *Cro. Jac.* 427.(b) 5 *T. R.* 335.(c) 4 *East*, 499.(d) 6 *Rep.* 16 a.(e) *Cro. Eliz.* 204.

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*Hawker v. Buckland (a), Doe d. Willey v. Holmes (b),
 Doe d. Palmer and Others v. Richards. (c)*

Cur. adv. vult.

The following certificate was afterwards sent: —

We have heard this case argued by counsel, and have considered the same, and are of opinion, that the said *George Blair*, the son of *John Blair*, under the circumstances aforesaid, had an estate-tail in the said premises upon the death of his father the said *John Blair*.

W. D. BEST.
 J. A. PARK.
 J. BURROUGH.
 S. GASELEE.

28th November 1828.

(a) 2 *Vern.* 105.

(b) 8 *T. R.* 1.

(c) 3 *T. R.* 356.

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Debt on bond, conditioned for paying Plaintiff 10,000*l.*, upon his form-

DEBT on the joint and several bond of the Defendant, *Jean Jacques Saint Mare* and others, the condition of which, as set out on oyer, appeared to be as following: —
 ing a company, and procuring purchasers for 9000 shares therein; such company to carry on a distillery according to a process for which a patent had been granted.

Plea, that the patent contained a proviso, rendering it void if transferred to more than five; that it was intended the said company should consist of more than five, and be formed for the purpose of enjoying the benefit of the letters-patent, of acting as a corporate body, and of dividing the benefit of the patent into 10,000 shares, transferrable and assignable without charter from the king; and that it was corruptly and illegally agreed between the parties, that the Plaintiff should form the company for such purposes, and should sell the 9000 shares in order to raise a larger sum of money, under pretence of carrying on the privilege granted by the patent:

Held, a bar to the action.

lows:

lows: —“ Whereas the said *Jean Jacques Saint Mare*, some time since, obtained three several letters-patent for the distillation of potatoes; and whereas the said *Jean Jacques Saint Mare*, *Stamp Brooksbank*, and *William Dorset Fellows* are now engaged in co-partnership together in carrying on a certain distillery to a very large extent at *Vauxhall*, called the *Belmont Distillery*, according to the system and method of distilling, for the use and exercise of which the said several letters-patent were granted to the said *Jean Jacques Saint Mare*, and which said distillery has been erected, set up, and established on certain leasehold premises belonging to them the said *Jean Jacques Saint Mare*, *Stamp Brooksbank*, and *William Dorset Fellows*; and whereas the said *Jean Jacques Saint Mare*, *Stamp Brooksbank*, *William Dorset Fellows* have it in contemplation to dispose of their shares and interest of, in, and to the said several patents, and of, in, and to the distillery, premises, plant, and stock in trade in and upon the same, and to part with the same to a company to be formed for that purpose; and whereas the said *Jean Jacques Saint Mare*, *Stamp Brooksbank*, and *William Dorset Fellows* have applied to and requested *Aimè Duvergier* to exert his influence amongst his numerous connexions and friends, so as to form such company, intended to be called “The Patent Distillery Company,” who shall appoint directors and trustees for the conduct and management of the said concern, which directors shall issue, under their hands and seals, 10,000 shares of the value of 50*l.* each share; and whereas the said *Aimè Duvergier*, in consequence of his connexion with different merchants, brokers, traders, and others in the city of *London*, hath consented and agreed to form the said company, to be called “The Patent Distillery Company,” among his own immediate connexions and friends, and to bring such persons

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persons together for the purpose of appointing directors and trustees for the government and management of such distillery concern, and to procure purchasers for 9000 shares, of the value of 50*l.* each share; and whereas the said *Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows*, in order to induce the said *Aimè Duvergier* to take the trouble of forming such company, and to use his influence amongst his connexion and friends, and to indemnify him from the charges and expenses that he may be put to in and about the same, have proposed and agreed, as soon as he or his executors or administrators shall have effected such object, and procured purchasers for 9000 of such 50*l.* shares, and obtained for such company the first call upon such shares of 5*l.* each, that they the said *Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows*, their heirs, executors, or administrators, or some or one of them, shall and will pay to the said *Aimè Duvergier*, his executors, administrators, or assigns, the full sum of 10,000*l.* sterling, by three equal payments or instalments of 3333*l.* 6*s.* 8*d.*, viz. the sum of 3333*l.* 6*s.* 8*d.* so soon as the first instalment on such 9000 shares shall have been paid, the sum of 3333*l.* 6*s.* 8*d.* so soon as the second instalment on the same shares shall have been paid, and the remaining sum of 3333*l.* 6*s.* 8*d.* so soon as the third instalment of the same shares shall have been paid; now, therefore, the condition of the above-written bond or obligation is such, that if the above-bounden *Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows*, their executors or administrators, or any or either of them, do and shall well and truly pay or cause to be paid unto the above-named *Aimè Duvergier*, his executors, administrators, or assigns, the full sum of 10,000*l.* of lawful money of *Great Britain*, in manner following, that is to say, the sum of 3333*l.* 6*s.* 8*d.*, part thereof on the said *Aimè Duvergier*,

Duvergier, his executors or administrators, forming the said before-mentioned company, and procuring purchasers for such 9000 shares, and payment of the first instalment or call thereon; the further sum of 3333*l.* 6*s.* 8*d.* on the second instalment on such shares having been paid; and the remaining sum of 3333*l.* 6*s.* 8*d.* on the third instalment on the same shares having been paid; then the above-written obligation to be void and of no effect, or else to be and remain in full force and virtue.

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The Defendant, after sundry pleas, on which issue in fact was taken, pleaded, fifthly, *actio non*, Because certain of the said several letters patent in the said condition of the said supposed writing obligatory mentioned, were letters patent of our sovereign lord the King, under the great seal of the United Kingdom of *Great Britain and Ireland*, bearing date at *Westminster* on a certain day, to wit, on the twentieth day of *March*, in the fifth year of the reign of our lord the King, whereby, after reciting, amongst other things, that the said *Jean Jacques Saint Mare* had, by his petition, humbly represented unto our said lord the King, that he was in possession of an invention of improvements in the process of an apparatus for distilling, our said lord the King gave and granted unto the said *Jean Jacques Saint Mare*, his executors, administrators, and assigns, his especial license, full power, sole privilege and authority, that he the said *Jean Jacques Saint Mare*, his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the said *Jean Jacques Saint Mare*, his executors, administrators, or assigns, should at any time agree with, and no other, from time to time, and at all times thereafter, during the term of years therein expressed, should, and lawfully might, make, use, exercise, and vend the said invention within that part of the

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United Kingdom of *Great Britain* and *Ireland* called *England*, our said lord the King's dominion of *Wales*, and town of *Berwick-upon-Tweed*, in such manner as to him the said *Jean Jacques Saint Mare*, his executors, administrators, and assigns, or any of them, should in his or their discretion seem meet, and that he the said *Jean Jacques Saint Mare*, his executors, administrators, and assigns, should, and lawfully might, have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for and during the term of years therein mentioned; to have, hold, exercise, and enjoy the said license, powers, privileges, and advantages therein-before granted or mentioned to be granted unto the said *Jean Jacques Saint Mare*, for and during and unto the full end and term of fourteen years from the date of the said last-mentioned letters patent next and immediately ensuing, and fully to be complete and ended according to the statute in such case made and provided: and it was by the said letters patent provided, and the same were declared to be upon the express condition that if the said *Jean Jacques Saint Mare*, his executors or administrators, or any person or persons who should or might, at any time or times thereafter during the continuance of that grant, have or claim any right, title, or interest in law or equity of, in, or to the power, privilege, and authority of the sole use and benefit of the said invention thereby granted, should make any transfer or assignment, or any pretended transfer or assignment of the said liberty and privilege, or any share or shares of the benefit or profit thereof, or should declare any trust thereof to or for any number of persons exceeding the number of five, or should open, or cause to be opened, any book or books for public subscription to be made by any number of persons exceeding the number of five, in order to the raising any sum or sums of money under pretence of carrying on the

said

said liberty or privilege thereby granted, or should by him or themselves, or his or their agents or servants, receive any sum or sums of money whatsoever, of any number of persons exceeding in the whole the number of five, for such or the like intents and purposes, or should presume to act as a corporate body, or should divide the benefit of the said last-mentioned letters patent or the liberties and privileges thereby granted, unto any number of shares exceeding the number of five, or should commit or do, or procure to be committed or done any act, matter, or thing whatsoever, during such time as such person or persons should have any right or title, either in law or equity, in or to the same premises, which would be contrary to the true intent and meaning of a certain act of parliament made in the sixth year of the reign of the late King George the First, intituled "An act for better securing certain powers and privileges intended to be granted by his Majesty by two charters for assurance of ships and merchandizes at sea, and for lending money upon bottomry, and for restraining several extravagant and unwarrantable practices therein mentioned," or in case the said power, privilege, or authority should at any time thereafter become vested in, or in trust for more than the number of five persons or their representatives at any one time, reckoning executors or administrators as and for the single person whom they represent as to such interest as they were or should be entitled to in right of such their testator or intestate, that then and in any of the said cases those letters patent, and all liberties and advantages whatsoever thereby granted, should utterly cease and become void, any thing therein before contained to the contrary thereof in anywise notwithstanding; as by the said letters patent, which said letters patent the Defendant brought into Court, might more fully appear: and the said Defendant further said, that others of the said letters patent, in the

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said condition of the said writing obligatory mentioned, were and are certain letters patent of our said lord the King, under the seal of our said lord the King appointed by the treaty of union to be used instead of the grand seal of *Scotland*, bearing date on a certain day, to wit, the 26th day of *February*, in the 5th year aforesaid; by which last-mentioned letters patent our said lord the King gave and granted to the said *Jean Jacques Saint Mare*, his executors, administrators, and assigns, by themselves or such other person as he or they might appoint or agree with, and no others, from time to time and at all times thereafter, during the term of years in the said last-mentioned letters patent expressed, that they might lawfully make, use, exercise, and vend an invention therein mentioned, of improvements in the process of, and apparatus for, distilling, within that part of the United Kingdom of *Great Britain* and *Ireland* called *Scotland*, in such manner as to the said *Jean Jacques Saint Mare*, his executors, administrators, and assigns, or any of them, should in his discretion seem meet:

Then followed the extent and conditions of the *Scotch* patent, which were the same as in the patent for *England*.

And the said Defendant further said, that the said several terms of fourteen years each in the said letters patent mentioned, at the time of the making of the said supposed writing obligatory, were, and yet are, unexpired, and that the said company, in the said condition of the said supposed writing obligatory mentioned, was meant and intended by the said *Jean Jacques Saint Mare*, the said Plaintiff, and Defendant, at the time of making of the said supposed writing obligatory, to consist of more than five persons, to wit, 10,000 persons, and to be formed for the purposes, amongst other things, of using, exercising, and enjoying the said exclusive liberties and privileges in the said two several letters patent in the said condition, and in this plea mentioned, for the use
and

and benefit of the said persons so exceeding the number of five, in that part of the said United Kingdom called *England*, and in that part thereof called *Scotland* respectively, under colour of the said letters patent respectively, to wit, at, &c. and so the Defendant said, that the said supposed writing obligatory was and is void in law, and this the said Defendant was ready to verify; wherefore, &c.

The Defendant pleaded, sixthly, *actio non*, Because certain of the said several letters patent in the said condition of the said supposed writing obligatory mentioned were letters patent of our sovereign lord the now King, under the great seal of the United Kingdom of *Great Britain and Ireland*, bearing date at *Westminster* on a certain day, to wit, the 20th day of *March*, in the fifth year of the reign of our sovereign lord the King, containing the like matters and things, and the like proviso and to the same effect as the said letters patent in the said fifth plea first mentioned, as by the said letters patent which the said Defendant produced to the Court might more fully appear; and the Defendant further said, that the said term of fourteen years in the said last-mentioned letters patent mentioned, at the time of the making of the said supposed writing obligatory, was, and yet is, unexpired, and *that the said company* in the said condition of the said supposed writing obligatory mentioned *was* at the time of the making thereof *intended by the said Plaintiff and Defendant to consist of more than five persons*, to wit, 10,000 persons, and to be formed for the purpose, amongst other things, of using, exercising, and enjoying the said exclusive liberties and privileges in the said last-mentioned letters patent mentioned, for the use and benefit of the said persons so exceeding the number of five, in that part of the United Kingdom called *England*, under colour of the said last-mentioned letters patent: by means of which

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premises in this plea mentioned the said supposed writing obligatory was and is wholly void, and this the said Defendant was ready to verify, wherefore, &c.

The Defendant pleaded, seventhly, and lastly, that certain of the said letters patent in the said condition of the said supposed writing obligatory mentioned were letters patent of our sovereign lord the now King, under the great seal of the United Kingdom of *Great Britain and Ireland*, bearing date at *Westminster*, on a certain day, to wit, the 20th day of *March*, in the fifth year of the reign of our said lord the King, containing therein the like matters and things, and the like proviso, and to the same effect, as the said letters patent in the said fifth plea first mentioned, as by the said last-mentioned letters patent, which the said Defendant produced to the Court might more fully appear: and the Defendant further said, that the said term of fourteen years in the said last-mentioned letters patent mentioned at the time of the making of the said supposed writing obligatory, was, and yet is, unexpired, and that *the said company* in the said condition of the said supposed writing obligatory mentioned *was by the said Jean Jacques Saint Mare, the said Stamp Brooksbank, the said Defendant, and the said Plaintiff intended at the time of the making the said supposed writing obligatory to consist of more than five persons, and to be formed for the purpose, amongst other things, of using, exercising, and enjoying the said exclusive liberties and privileges in the said last-mentioned letters patent mentioned, for the use and benefit of the said persons so exceeding the number of five, in that part of the United Kingdom called England, under colour of the said letters patent, and of the acting as a corporate body, and dividing the benefit of the said last-mentioned letters patent, and the liberties and privileges thereby granted, into divers shares, exceeding the number of five, to wit,*

10,000

10,000 shares, to be transferable and assignable, without any charter from our lord the King, and that, before the time of the making of the said supposed writing obligatory, to wit, on, &c., at, &c., it was corruptly and illegally agreed, by and between the said Plaintiff and the said Jean Jacques Saint Mare, the said Stamp Brooksbank and the said Defendant, that the said Plaintiff should form such company, as in this plea mentioned, for the purpose in this plea mentioned, and should sell and dispose of divers, to wit, 9000 of such shares as in this plea mentioned, being the shares in the said condition of the said supposed writing obligatory mentioned, and should cause divers large sums of money to be subscribed by public subscription by numbers of persons exceeding five, to wit, 9000 persons, in order to the raising a large sum of money, to wit, 450,000*l.*, under pretence of carrying on the said liberty or privilege (amongst other things) by the said last-mentioned letters patent granted; such money to be in part received by the said Jean Jacques Saint Mare, Stamp Brooksbank, and the said Defendant, for the purpose of carrying on the said liberty and privilege for the benefit of the said last-mentioned persons, so exceeding five; and that the said Jean Jacques Saint Mare, the said Stamp Brooksbank, and the said Defendant, should, in consideration thereof, pay to the said Plaintiff the sum of 10,000*l.* of lawful money of Great Britain, in the manner in the said condition of the said supposed writing obligatory mentioned; and that for securing the payment of the sum of 10,000*l.* the said Defendant should make and seal, and as his act and deed deliver to the said Plaintiff a writing obligatory, in the penal sum of 10,200*l.*, conditioned for the payment of the said sum of 10,000*l.* in manner aforesaid: and the Defendant further said, that in pursuance of the said corrupt and unlawful agreement, the said Defendant

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afterwards, to wit, on, &c., at, &c., made and sealed, and as his act and deed delivered the said supposed writing obligatory in the said declaration mentioned, and the said Plaintiff then and there accepted and received the same of and from the said Defendant, upon the said corrupt and unlawful agreement: by means of which premises in this plea mentioned the said supposed writing obligatory was and is wholly void, and this the said Defendant was ready to verify, wherefore, &c.

Demurrer *inde*, and joinder.

Wilde Serjt. in support of the demurrer. The substance of the seventh plea (which comprehends also the matters contained in the fifth and sixth) is, that it was *intended* by the parties to do certain acts, and, among them, to form a company which should act as a corporate body, and should transfer and assign shares without charter from the crown.

But a mere allegation of intention is not sufficient to shew that the bond was void, for the intention to commit an illegal act is not necessarily followed by commission. If such an allegation be sufficient, every existing corporation is open to the same objection, for there is none of which it may not be predicated that before becoming a corporation it intended to become a corporation. The intention, however, might be perfectly legal, for the parties might intend to become a corporation by procuring an act of parliament for the purpose; a mode of becoming so, which is recognized in 6 G. 2. c. 18.; and when the Defendant might have obtained such an act himself, it is not for him to object that the Plaintiff did not obtain it: therefore in *Haines v. Busk* (a), where, in an action for brokerage, the defence was, that the voyage

(a) 5 Taunt. 521.

undertaken was illegal for want of a licence, the Court held, that as the Defendant ought to have procured the licence, he should not take advantage of the want of it. Nor is it sufficiently shewn that the acts intended were illegal. The Defendant should have specified what the acts were, in order that the Court might judge whether they were acts peculiar to a corporate body or not. The Defendant might have been in error in supposing that certain acts which he had in view were exclusively acts of a corporate body.

Acting as a corporate body, for instance, in private matters, would not render the parties liable to a *quo warranto*, as, in the matter of a warren; *Rex v. Cann.* (a) At all events, by making the allegation in this general way, the Defendant offers matters of law to be tried by a jury. He ought to have afforded the Plaintiff an opportunity of taking issue on the acts impugned, and on the means by which it might be proposed to justify them. The only act specified is, that it was intended the proposed company should transfer and assign shares without charter from the King. But there is nothing illegal in that. It might have been intended to transfer them under an act of parliament to be procured for the purpose; and even without that, the mere transfer would not be in itself illegal, but only a symptom that the body transferring was an illegal combination: *Rex v. Webb and Others.* (b) The transfer would be legal, if the assignee took it subject to the original covenants: *Pratt v. Hutchinson.* (c) A share in a partnership may be sold under an execution, and the assignees of a bankrupt may carry on his trade. At all events a partner may assign the whole of his interest, although it may depend on the terms of the partnership whether the assignee shall carry on business with the others or not.

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(a) *Andr.* 15.

(b) 14 *East*, 406.

(c) 15 *East*, 511. §

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In *Josephs v. Pebrer* (a), where a contract for shares in a joint stock company was held void, the company was formed; and the case was argued on the provisions of 6 G. 1. c. 18., which has since been repealed.

Taddy Serjt. contra. The demurrer admits that it was intended the company should act as a corporate body, and should transfer shares without a charter from the crown; and that it was *corruptly and illegally* agreed between the Plaintiff and the Defendant that the Plaintiff should form the company for those purposes. With such an admission, it would have been superfluous to have specified what particular acts of a corporate body the company was to perform; for if it was corruptly and illegally agreed, it could not have been intended that the company should act legally as a corporation.

But the allegation that it was intended the company should act as a corporate body is sufficiently explicit, without specifying particular acts. The Courts take judicial notice of the functions and privileges of corporate bodies as enumerated in *Com. Dig. Franch. F. l. 9 Rep. 25 b. 10 Rep. 33 b.*


Connecting the seventh plea with the condition in the bond and the patent, it is clear the transaction was illegal, even at common law.

The patent is declared on the face of it to be void, if, by any contrivance, assigned for the benefit of more than five persons: by the condition of the bond the Plaintiff was to procure purchasers for 10,000 shares in the projected company, who were to conduct the process described in the patent: by that one act the patent would have become void, and the purchasers would have paid their money for nothing: upon the face of the plea the agreement appears to have been a manifest fraud on

(a) 3 B. & C. 639.


the public, and the agreement is therefore void, as being inconvenient and contrary to public policy, as the patent would also be, if attended with ill effects: 3 *Inst.* 184. But the extensive transfer of shares is of itself inconvenient and illegal. A chose in action cannot be transferred. That rule was originally established to prevent maintenance; *Co. Lit.* 214 *a.* 266 *a.*; and though maintenance be less dreaded in modern times, suitors who have to contend against the joint stock purse of an opulent company are exposed to the effects of disparity of means not experienced in contests between individuals.

Notwithstanding the stat. 6 G. 1. c. 18. has been repealed, an agreement such as that described in this plea is illegal at common law, as tending to the prejudice and grievance of the King's subjects. "The necessary effect of such a practice (the transfer of shares) is to introduce gaming and rash speculation to a ruinous extent: in such transactions one cannot gain unless another loses; whereas in fair mercantile transactions each party, in the ordinary course of things, reaps a profit in his turn. In this case the association appears to be one of which the effect cannot but be mischievous." *Per Abbott C. J.* in *Josephs v. Pebrer*. In *Kinder v. Taylor* (a) Lord Eldon threw some doubt upon *Rex v. Webb*; that case, he said, "was scanty in argument, and the common law was not considered in it, because it was an indictment upon the statute. He spoke with all respect of Lord Ellenborough, who had decided the case, and whose memory he venerated as a lawyer; but he should have been glad if his Lordship had taken the trouble to state what was assuming to act as a corporation. For many consider-

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(a) *George on Joint Stock Monte Mining Company*. Sweet, *Companies*, p. 46. (called there, *Chancery Lane*, 1825. p. 44., the case of the Real Del

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ations, it would have been very fortunate, if the Court had then looked at this as a distinct question, and had been good enough to declare, ‘this is not acting as a corporation, because to act as a corporation you must act so and so.’ It now, however, became necessary to declare, either by legal judgment or by a declaratory act of parliament, what was the meaning of presuming to act as a corporation; and by whomsoever it was declared, not only what was doing, but what had been done, must be attentively regarded. It was for this reason, he thought, that the *King v. Webb* called for further explanation.” “His opinion might be of use to nobody, but it was as well that the world should know it:” “That opinion was, and he had taken some trouble to consider the question, that if it could satisfactorily be made out to a jury that a party was opening books, raising a premium upon the shares, and then took care to get himself out of the scrape, that was an indictable offence.” Such a company is illegal, even when formed for useful purposes; as, for carrying on a private brewery; *Buck v. Buck*. (a) And it cannot be argued that the Plaintiff was ignorant of the proviso limiting the assignment of the patent to five, for the patent is referred to in the condition of the bond on which he sues. If the transaction between him and the Defendant had gone but a little further, it had been an indictable offence: *Rex v. Stratton and Others*. (b)

Wilde. The clear intention of the parties was to find purchasers for the premises where the distillery was carried on, and for the business. The transfer of the patent was not the object of the transaction, but the transfer of the business, which could not be transferred without communicating a knowledge of the process by which it was carried on; and it was necessary that the

(a) 1 Camp. 547.

(b) 1 Camp. 549.

assignees should by some means be protected against any charge of infringing the patent-right of the assignor. There is nothing illegal in transferring shares in a business, subject to the original liabilities, and there was nothing in this business prejudicial to the public interests. But the transfer of shares, and the raising a capital by subscriptions, are in effect the only objections made by this plea against the intended company; and with regard to the latter, even under the 6 G. 1. c. 18., Lord *Ellenborough* says, in *Rex v. Webb and Others*, "We think it impossible to say that it makes a substantive offence to raise a large capital by small subscriptions, without any regard to the nature and quality of the objects for which the capital is raised."

It nowhere appears in the pleadings that the Plaintiff was aware of the proviso which rendered the patent void upon transfer to more than five, and there is no law which requires that such a proviso shall be inserted in a patent.

Cur. adv. vult.

BEST C. J. now delivered the judgment of the Court; and after reading the pleadings, and particularly advert- ing to the condition of the bond, and the terms of the patent, as set forth *ante*, p. 252. proceeded as follows:—

It appears from the condition of the bond that the Plaintiff was not entitled to any part of the 10,000*l.*, which the obligors had bound themselves to pay him, until he had formed a company, and procured purchasers for 9000 shares, and payment of the first instalments or calls on those shares. The forming the company, the selling 9000 shares of what was to be called the stock of such company, and the prevailing on the purchasers to pay one third of their subscriptions, or 150,000*l.*, is a condition precedent to the Plaintiff's right of action.

The proviso contained in the patent shews that the
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Plaintiff cannot perform this condition without committing a fraud on a vast number of persons, and that if he could obtain any subscriptions, the subscribers would be entitled to recover back the money paid on them, as being obtained by fraud, or as money paid without consideration. The moment the company was formed, and the patents were transferred to them, they would cease to exist as legal patents, for they would be destroyed by any assignment to more than five persons, or to any persons in trust for more than five persons. The condition of the bond shews, that the patents were to be assigned to a company to be formed by subscription, and the shares in which were to be transferable. Any one of these circumstances would render the patents void. This difficulty was felt by the counsel for the Plaintiff, and he attempted to extricate his client from it by insisting that it was not intended to convey the exclusive right of distilling spirits from potatoes, secured by the patent, but only to free the intended company from being liable to the patentee for using his invention. But it is clear from the terms of the bond that the object of the parties was not to destroy the patents, but that they professed to assign the privilege granted by them to the company which the Plaintiff was to form.

The words of the condition of the bond are, "have it in contemplation to dispose of their interest of, in, and to the several patents, and of, in, and to the premises and stock in trade, and to part with the same to a company." These terms indicate an intention not to destroy, but to transfer unimpaired the monopoly secured by the patents. But it has been said it does not appear from the pleadings that the Plaintiff knew of this proviso in the patents, and that the insertion of such a proviso in patents is not required by any law. But we must presume that he knew the contents of the patents referred to by the bond on which he brings his action ;
of

of the patents which, it appears by the same bond, he undertakes the sale in the manner stated in that bond. Every man who undertakes to do a thing must be presumed to know what he undertakes, unless he can shew that he has been deceived by the other party. How could he undertake to negotiate for the sale of the patents, unless he had seen them and knew their contents?

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If the Plaintiff knew the terms on which the patents were granted, he must know that what he undertook to do could not be done. As he cannot legally perform his part of the contract, he never can be in a condition to recover the compensation stipulated to be paid on its full and complete performance. There are some old authorities which say, that if a man binds himself by the condition of his bond to do what at the time he executed the bond it was impossible for him to do, the bond shall be considered as without condition, and the obligee may recover the penalty. These authorities are rather opposed to the Plaintiff's claim; they apply only to cases where there is nothing to be done by the obligee; here the Plaintiff must do something before the bond can be enforced. If what he is to do can never be legally done, the instrument must be inoperative. The Plaintiff not having performed the first condition, can never have a right of action on it. The situation of the Plaintiff in this case, is like that of the defendants in the cases alluded to. It is his fault that he has undertaken what he cannot perform. In *Pullerton v. Agnew* (a), Holt C. J. said, "Where the condition is underwritten or indorsed, there that only is void, and the obligation is single; but where the condition is part of the lien itself, and incorporated therewith, if the condition be impossible, the obligation is void." In the case before us, the service of the Plaintiff, and payment

(a) 1 Salk. 172.

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for it by the Defendant, are incorporated together, and if the service cannot be performed, the whole instrument is a nullity.

But it is apparent from the facts disclosed by the condition of this bond and the patents that the scheme in which the parties to this action were engaged was one of those bubbles by which, to the disgrace of the present age, a few projectors have obtained the money of a great number of ignorant and credulous persons, to the ruin of those dupes and their families, and by which a passion for gambling has been excited, that has been most injurious to commerce and to the morals of the people.


What any one must discover from reading the instruments, the parties to them must be fully informed of. It cannot be too well known, that there is no place for persons engaged in such transactions in courts appointed for the decision of civil causes. Although the statute of 6 G. 1. be repealed, the common law relating to such schemes is expressly reserved by the repealing statute; and no one doubts, if it can be shewn, as it easily may, that such schemes are fraud-traps, and injurious to the public welfare, that the forming of them is an indictable offence at the common law.

The seventh plea states, and the demurrer admits, that the Plaintiff and the Defendant intended that the company which the Plaintiff undertook to form should act as a corporate body without any charter from the King, and that the benefit of the letters patent were to be enjoyed by this pretended corporate body, and that the capital of this body was to be divided into 10,000 shares, which were to be *transferable* and *assignable*.

It has been said at the bar, that the parties might intend to obtain an act of parliament to give this body a legal existence. Nothing of this intention appears on the record.

It

It has been further said, that the Defendant should have shewn how the parties intended to act as a corporation. If this is not correctly pleaded, advantage should have been taken of the technical defect by special demurrer. If what they intended to do would not have been acting as a corporation, they should have traversed the plea. By demurring, the Plaintiff has confessed himself guilty of intending to form a company that was to act as a corporation.

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But the shares were to be transferable. There can be no transferable shares of any stock except the stock of corporations, or of joint-stock companies created by acts of parliament. When it is said the shares were to be transferable, that must mean, that the assignee was to be placed in the precise situation that the assignor stood in before the assignment; that the assignee was to have all the rights of the assignor, and to take upon him all his liability. Now the assignee can join in no action for a cause of action that accrued before the assignment. Such rights of action must still remain in the assignor, who, notwithstanding he has retired from the company, will still remain liable for every debt contracted by the company before he ceased to be a member. Indeed, the members of corporations cannot assign their interest, and force their assignees into the corporation, without the authority of an act of parliament. Such authority is expressly given by the bank acts, the South-Sea acts, and by other statutes creating companies that possessed stock, which it was deemed proper to be rendered transferable.

The pretending to be possessed of transferable stock is pretending to act as a corporation, and pretending to possess a privilege which does not belong to many corporations. But this is put only as one of the proofs of the intention of the projectors of this company that it should act as a corporation. It is not necessary on these pleadings to decide whether the forming a com-

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pany with such shares is of itself, without other circumstances, pretending to act as a corporation; because, it is by the pleadings distinctly admitted, that the Plaintiff and Defendant intended that the company should act as a corporation. Persons who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the King, by usurping on his prerogative. By the 9th of *Anne*, c. 20., the Court may not only give judgment of ouster, but may fine a defendant convicted on a *quo warranto*. This shews that the usurpation is considered as a criminal act. But it has been insisted, that the usurpation is only criminal where a party, without authority, acts in a public office, and that the pretended corporation which these parties were to set up did not affect the public, but was a scheme with which certain individuals only were connected. Most of the statutes relative to *quo warrantos*, from the statute of *Gloucester* down to the 9th of *Anne* inclusive, have the words *offices and franchises*. Franchises are privileges for the advantage of individuals. In *Com. Dig.* title *Quo Warranto*, many things are mentioned as matters for which *quo warranto* will lie, which are valuable only to the individuals who claim them against the crown, and are not connected with any public duty. But it concerns the public that bodies, composed of a great number of persons with large disposable capitals, should not be formed without the authority of the crown, and subject to such regulations as the King in his wisdom may deem necessary for the public security.

The acting as such a corporation, without charter from the crown, is contrary to law, and no man can maintain an action on a bond given to secure payment of a compensation to the obligee for the formation of any such pretended corporations. For these reasons, judgment must be for the Defendant.

Judgment for Defendant accordingly.

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THE Defendant having been arrested for 120*l.*, deposited that sum and 10*l.* more in the hands of the sheriff in lieu of bail, which sums, with 10*l.* more, were paid into Court to abide the event of the suit, under the 7 & 8 G. 4. c. 71. s. 2., by which it is enacted, that if in such case "judgment be given in the said action for the Defendant, the said money so deposited or paid into Court shall, by order of the Court, upon motion to be made for that purpose, be repaid to such Defendant."

Money paid into court under 7 & 8 G. 4. c. 71., to abide the event of a cause, is not paid out under a rule absolute in the first instance.

Judgment having been given for the above Defendant upon a verdict in her favour,

Andrews Serjt. now moved for a rule absolute in the first instance, for repayment to the Defendant of the money paid into Court as above, upon production of the *postea*; but

The Court, upon consulting its officers, and adverting to the possibility of a writ of error, granted a rule to shew cause why the money should not be paid out to the Defendant or her attorney, upon production of the certificate of the clerk of the judgments of judgment having been signed, and the prothonotary's certificate of the money having been paid in.

On a subsequent day the rule was made absolute on affidavit of service, and production of the certificate as above; the costs of the rule being allowed with the costs in the cause.

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No. 27. CARRUTHERS v. PAYNE, Assignee of THOMPSON,
a Bankrupt.

A chariot was built to Plaintiff's order, and paid for by him : when finished in other respects, Plaintiff ordered a front seat to be added ; but the builder being slow in making this addition, Plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. Plaintiff being afterwards dissatisfied, ordered the chariot to be sold, and while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became a bankrupt, and his assignee seized the chariot : more than three months afterwards the Plaintiff commenced his action :

TROVER for a chariot. At the trial before *Best C.J.*, *London* sittings after *Trinity* term, it appeared that the chariot had been built to the Plaintiff's order, and paid for by him. After it had been finished in other respects, the Plaintiff directed a front seat to be added, but the builder being slow in the execution of this addition, the Plaintiff sent for the chariot six or seven times, and the builder promised to deliver it. Subsequently, the Plaintiff being dissatisfied, ordered the chariot to be sold, and it was, according to the custom of the trade in such cases, standing in the builder's warehouse for that purpose, the front seat not having been added, when a commission was sued out against him, and the chariot was seized by the assignee. The Plaintiff commenced the present action more than three months after the seizure.

On the part of the Defendant it was objected, first, that the chariot was unfinished, and that trover did not lie for an unfinished article ; secondly, that the chariot was properly seized by the Defendant as being in the order and disposition of the bankrupt, with consent of the true owner ; and, thirdly, that under the forty-fourth section of 6 G. 4. c. 16. the action ought to have been

Held, first, that the Plaintiff had sufficient property to maintain trover ; secondly, that the chariot did not pass to the assignee as being in the order and disposition of the bankrupt with the consent of the owner ; and, thirdly, that the assignee was not within the protection of the forty-fourth section of 6 G. 4. c. 16., which limits actions to three months after the fact committed.

commenced

commenced against the assignee within three months after the seizure.

A verdict having been given for the Plaintiff, subject to the opinion of the Court upon these points,

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Taddy Serjt. moved to set it aside and enter a non-suit. In support of the first objection he cited *Mucklow v. Mangles* (a), (recognized in *Woods v. Russell* (b),) where it was holden, that if a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him.

Then, the chariot being in the bankrupt's warehouse, where the Plaintiff had suffered it to remain, and not being distinguishable from the bankrupt's property, must be taken to have been in his disposition with the consent of the owner. In *Knowles v. Horsfall* (c), a spirit-merchant sold to a wine-merchant several casks of brandy, some of which, at the time of the sale, were in the spirit-merchant's own vaults, and others in the vaults of a regular warehouse-keeper: it was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. The vendee marked the several casks with his initials, and it was notorious to the persons carrying on the wine trade at the place, that this sale had been effected, but no notice of it had been given to the warehouse-keeper, with whom some of the casks were deposited. The spirit-merchant having become bankrupt while the brandies remained where they originally were, it was held, that the whole of them passed to his assignees, as goods in his possession, order, and dis-

(a) 1 Taunt. 318.

(b) 5 B. & A. 942.

(c) 5 B. & A. 134.

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position by the consent and permission of the true owner, within the 21 *Jac.* 1. c. 19. s. 11. And in *Thackthwaite v. Cock* (a), it was held, that a custom for purchasers of hops from hop-merchants to leave them in the merchant's warehouse for the purpose of resale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition. That case is not to be distinguished from the present.

But at all events the action is too late; for by 6 G. 4. c. 16. s. 44. "*Every action brought against any person for any thing done in pursuance of this act, shall be commenced within three calendar months next after the fact committed.*" The fact, for the redress of which this action is brought, is the conversion of the Plaintiff's chariot by the Defendant, and that conversion was complete by the act of seizure under the commission.

A rule *nisi* having been granted,

Wilde Serjt. shewed cause.

The answer to the first objection is, that the chariot was in effect finished. The mere addition of a fore seat, after the article had been paid for, gives no more reason for calling it unfinished than the sending it to be repaired in any trifling particular. But in *Woods v. Russell*, where the defendant ordered a ship, and paid for it by instalments as the building advanced, the builder having registered her in the defendant's name, the Court held the property to be vested in him, and not in the assignees of the builder, although he became bankrupt before the ship was finished, and even before she was launched. That case, therefore, goes farther

(a) 3 *Taunt.* 487.

than

than the present; and the bankrupt's receiving from the Plaintiff the full price of the carriage after it had been built to his order, is as unequivocal an admission that the property was in the Plaintiff as the registering of the ship in *Woods v. Russell*.

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The second objection is answered by the fact that the Plaintiff had sent for the chariot repeatedly, and the bankrupt had promised to deliver it. It was in the possession of the bankrupt, therefore, through his own procrastination, and not by the Plaintiff's consent. In *Knowles v. Horsfall*, and *Thackthwaite v. Cock*, the goods were left in the possession of the bankrupt by the express agreement of the parties. Those cases, therefore, do not apply

Then, the forty-fourth section of 6 G. 4. c. 16. applies only to actions brought against commissioners or other officers acting in the discharge of a public duty, and not to actions against assignees or others for the purpose of trying a disputed private claim. If it applied to assignees, the provision in the eighty-seventh section, which enacts that no title to property shall be impeached, unless the bankrupt shall have commenced proceedings to supersede the commission *within a twelvemonth*, would be altogether nugatory; for the usual mode of commencing such proceedings is by an action against the assignees. But the forty-fourth section is connected with the forty-first, forty-second, and forty-third (all of which apply exclusively to the commissioners), and is necessary to complete the protection afforded to them under the old law, 1 Jac. 1. c. 15. s. 16. The forty-first requires a month's notice to be given to the commissioner before proceeding against him; the forty-second enacts, that the Plaintiff shall not recover unless he prove such notice at the trial; and refers to costs *thereinafter* mentioned; the forty-third enables a commissioner to tender amends within one month after

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notice, and to plead the tender in bar; and the forty-fourth, by analogy to several statutes which protect public officers in other situations, limits the time for bringing actions to three months; and the conclusive proof that the expression "*any person*" in that section has reference only to any of the commissioners or other officers described in the three preceding sections, is, the enactment that if judgment be given against the Plaintiff the Defendant shall recover double costs, the costs referred to in the forty-second section: an enactment, frequent and salutary as applied to the protection of officers performing a public duty, but unusual and oppressive as applied to parties contending about ordinary questions of property. Magistrates, officers, gaolers, and others have been protected by similar limitations. So, the treasurer of the *West India Docks* (under the words *any person or persons*), by the act relating to that establishment, 39 G. 3. c. 69. ss. 184, 185. He, however, is to all intents a public officer; bound to receive dues; responsible to the revenue; and not acting in such matters for his own benefit. But there is no instance of so short a limitation upon mere questions of property between individuals acting on their own account, as assignees do, who, for the most part, are creditors of the bankrupt.

Taddy. The Plaintiff had contracted to have a chariot with a front seat: his only title to the chariot was by virtue of that contract. The chariot in question having no front seat, could not be the chariot for which he had contracted, and consequently he had not sufficient title in it to maintain trover. It is true, that in *Woods v. Russell*, the ship for which the Defendant had contracted was not completely finished, but the builder had registered her at the custom-house in the name of the defendant, and the decision turned mainly upon the peculiar provisions of the register-acts.

Then,

Then, secondly, the builder of the chariot was the true owner, and the chariot was in his order and disposition as such, until it was delivered pursuant to the contract. In *Knowles v. Horsfall*, although the purchaser had put his name on the casks he had purchased, and some of them had actually been delivered under the contract, the rest remaining in the possession of the vendor, were holden to pass to his assignees; and *Thackthwaite v. Cock* was decided on the same principle.

Lastly, if the forty-fourth section of 6 G. 4. c. 16. were not intended to apply to the acts of assignees, and all others as well as commissioners, there would have been no reason for employing only the word *commissioners* in ss. 41, 42, 43., and the expressions “every action, brought against *any person*, for *any thing*,” in the forty-fourth; the difference in the form of expression could not be accidental. It is for the benefit of the whole body of creditors to extend such protection to assignees as well as commissioners; for so long as they continue liable to actions in their capacity of assignees, they cannot safely proceed to make any dividend, and ought, therefore, if not protected by this section, to wait six years for that purpose. The *West India Dock* act, 39 G. 3. c. 69., extends the protection of 24 G. 2. c. 44. (for rendering justices of peace more safe in the execution of their office) only to the mayor, aldermen, and justices *specificatim*. But the treasurer of the docks was holden, in *Wallace v. Smith (a)*, to come within the protection of the further provision that “no action or suit shall be commenced against *any person* or *persons* for any thing done in pursuance or under colour of this act, until fourteen days’ notice shall be thereof given in writing, or after three calendar months next ensuing the time when the act or thing shall have been done for which such

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(a) 5 East, 114.

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action shall be brought." And the treasurer in that case was acting in a private matter, which as much concerned his own interest and that of the company, as a seizure by the assignee of a bankrupt can concern the interests of himself and the other creditors. *Gaby v. The Wilts and Berks Canal Company (a)*, shews that "*the act done*" means any tort for which a civil remedy may be obtained; and the words of 6 G. 4. c. 16. "*the fact committed*," do not admit of any other construction.

The eighty-seventh section of the statute applies only to cases where the commission has been superseded, and, therefore, is not incompatible with the construction which the Defendant seeks to put on the forty-fourth.

BEST C. J. Three objections have been taken to the verdict in this case; and the first is, that under the circumstances the Plaintiff could not maintain trover. If the article in dispute had rested as it was immediately after the bargain, perhaps there might be ground for the objection, and the case might fall within the principle of the decision in *Mucklow v. Mangles*; where *Heath J.* said, "A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another: if the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods so sold:"—although, if a case precisely the same as *Mucklow v. Mangles* were to occur again, it might require further consideration. But the present case is very different from that: for here both the builder and purchaser treated the chariot as finished; the whole of the price was paid, and the Plaintiff sent for it several times, perhaps suspecting the builder's situation. Is it to be said

(a) 3 M. & S. 580.

that,

that, because he ordered a seat to be added, and afterwards determined upon selling the chariot, he is to be divested of his property in it, even when the fact of his sending repeatedly shews that he was desirous to have it, whether the seat were added or not? This disposes of the next objection, that the chariot was in the order and disposition of the bankrupt, with the consent of the true owner, and of the argument, that the builder must be esteemed the true owner till actual delivery. The Plaintiff was the true owner: for according to the decision in *Hinde v. Whitehouse* (a), the property must have passed to him upon the completion of the sale, and it is absurd to say that the chariot remained in the possession of the builder with the plaintiff's consent, after he had sent for it six or seven times.

The third objection is one of general importance, which the Court will take time to consider. But for that, I should not have reserved the other two points.

PARK J. I have no doubt on the first and second points, and I do not say that I should agree with the decision in *Mucklow v. Mangles*, if the case were to occur again. But the present is very different, and falls, in effect, within the exception expressly made by *Heath J.*: "If the thing be in existence at the time of the order, the property of it passes by the contract;" here, at least, upon the completion of the contract by the payment of the whole price, the thing was to all intents in existence. As to the second point, it would be a violation of common sense to say that the chariot was in the order and disposition of the bankrupt with the owner's consent, after he had sent for it six or seven times.

(a) 7 East, 558.

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BURROUGH J. I have no doubt on any of the points, but as the third is of very general importance, it ought to receive further consideration.

GASELEE J. I entertain no doubt on the two first objections. The answer to the first is, that the chariot was finished; and as to the second, if this article be held to have been in the order and disposition of the bankrupt, with the consent of the true owner, every man who sends his carriage to have a nail driven into it, will be liable to lose it under a commission against the builder. The last point is of general importance, and upon that

Curr. adv. vult.

BEST C. J. now stated, that *Park J.* and *Burrough J.* had no doubt on the third point, and that though *Gaselee J.* entertained some doubt, it was not to such an extent as to induce him to differ from the rest of the Court.

The question is, Whether trover against the assignees of a bankrupt must be brought within three months after the time of the alleged conversion.

When the objection was started at *Nisi Prius* I thought it alarming to the commercial interests of the country, because it would be most mischievous if persons sending goods from all parts of the world should be deprived of all redress, if, in case of their agent's bankruptcy, they had not the good fortune to be able to commence proceedings within three months; and, upon looking into the act, I am of opinion that the forty-fourth section does not apply to cases of this sort. That section is as follows: "Be it enacted, that every action brought against any person for any thing done in pursuance of this act shall be commenced within three calendar months next after the fact committed; and the defendant or defendants in any such action may plead the general issue, and give this act, and the special matter in evidence

dence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, the jury shall find for the defendant or defendants, and if there be a verdict for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, or discontinue his or their action or suit after appearance thereto, or if, upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall recover double costs."

It would be extraordinary, indeed, if the legislature should mulct a party with double costs for failing in the establishment of an ordinary claim against assignees, when, if he had failed as against the bankrupt, he would have been liable to no more than the usual charges. Why should such a party be placed in a situation different from other claimants who are liable only to single costs? Undoubtedly the language of the section is very general, but the words "*any act done*" can scarcely apply to the pecuniary arrangements in which, chiefly, the assignees are concerned: we think they apply rather to acts done for the purpose of taking possession of the property; as by commissioners, or messengers or others, acting under their warrant. It is proper that such persons should have a protection, which it is unnecessary to extend to the assignees. Persons so acting as public functionaries have no funds to answer the expense of proceedings brought against them, and it is therefore they are allowed double costs, in case they are found to be in the right; but the assignees have the property of the bankrupt, and in every respect stand in the same situation as he. The Court of King's Bench appear, in *Wallace v. Smith*, to have put a similar construction on the words *any thing done*, by expressing a doubt, whether they applied to such things as could be the ground of an action of *assumpsit*.

But

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But in other respects that case was different from the present. By the act on which that decision turned, the *West India Dock Company* could only be sued in the person of their treasurer; for that purpose he represented the company; if the protection given by the 185th section of the act did not apply to the company, it applied to nobody; and Lord *Ellenborough* concludes his judgment by saying: "The plaintiffs themselves have, by their own action and declaration, so far put a construction upon *the thing done* as having been done under colour of the act, that they have made the treasurer defendant in a case where the only grievance complained of is imputed to the company." The words of the act too, in that case, went far beyond those of the act under consideration, limiting the commencement of actions to three months, "for any thing in pursuance or *under colour* of that act." In *Sellick v. Drake and Smith (a)*, where one of the defendants was treasurer of the same company, I decided the same point, at *Nisi Prius*, on the authority of *Wallace v. Smith*, and my decision was afterwards confirmed by this Court. (b) In that case there was no person but the treasurer to answer the description of the party protected by the act; here the assignees do nothing, except in the distribution of property, and then they act in right of the property, and not under any power conferred for special purposes by the act.

Rule discharged.

(a) 2 *Carr. & Paine*, 284.

(b) The case is reported 3 *Bingb.* 603., on a rule which had been obtained on the part of the defendants, *Drake and Keeling*, to set aside a verdict against them in trover.

The goods, in respect of which the action was brought, having been lodged in the *West India docks*, *Smith*, the treasurer of those docks, was joined as a defendant in the action; and a ver-

dict having been found for him under the direction of the Lord Chief Justice, on the ground that the action was commenced more than three months after the thing done, a rule to set it aside was, as against him, refused, as it appears above. I was unavoidably absent from *London* at the time the rule *nisi* was moved for, and the decision as to *Drake and Keeling* turns on another point.

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DICAS v. JAY.

Nov. 27.

ASSUMPSIT against the Defendant, an attorney, for negligence in the conduct of a suit. There were eleven special counts on the negligence, and common counts for money paid, &c. Money was paid into court sufficient to cover the demand on the common counts.

The cause having been referred to arbitration, under an order of *Nisi Prius*, the arbitrator found that the Plaintiff had "good cause of action for 23*l.* 14*s.* 10*d.*," and directed a verdict to be entered for the Plaintiff for that sum.

By consent, judgment was to be entered up as of last term.

Cross Serjt. moved for a rule *nisi* to set aside this award; alleging, that as the question of negligence had been submitted to the arbitrator, and he had found that the Plaintiff had good cause (not causes) of action, he ought to have shewn whether the negligence or the money paid was the cause of action, and to have ordered the verdict to be entered for the Plaintiff on the count to which the finding applied; otherwise it did not appear whether he had enquired into all the matters submitted to him; and if the Plaintiff had no cause of action in respect of the negligence, the cause of action on the money counts was covered by the money paid into court, and the award was bad for uncertainty.

A rule *nisi* was granted; but the grounds on which it was sought to set aside the award not being specified in it,

1. The objections against an award ought to be specified in a rule *nisi* obtained for the purpose of setting it aside; but an omission in that respect is not conclusive to preclude the Court from entertaining the objections.

2. Upon a declaration of eleven special counts for negligence, and common counts for money paid, &c., an arbitrator, under an order of *Nisi Prius*, found that the Plaintiff had "good cause of action for 23*l.* 14*s.* 10*d.*," and directed a verdict to be entered up for that sum: Held, sufficiently certain.

Wilde

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Wilde Serjt., who shewed cause, objected, that by the practice of the Court the rule *nisi* ought to state the objections to the award, which could not otherwise be entered on; but he insisted that the award was sufficiently certain, amounting in effect to a general verdict on all the counts.

Cross and *Russell* Serjts. in support of the rule. There is no written rule of practice requiring in this Court the statement in the rule *nisi* of the specific grounds on which it is proposed to set aside an award; and if any such practice exists — (the prothonotary here stated that it did) — it is not conclusive against the Court's having the objections argued: the rule in the King's Bench, although it requires the objections to be specified, does not preclude the Court from hearing them, if they be not specified.

BEST C. J. The practice as to stating in the rule *nisi* the grounds of objection to an award is not so conclusive as to prevent us in this Court from hearing the objections, although not so specified. But this award is so clearly made upon the whole matter that I see no reason for setting it aside. In effect, a verdict has been found on all the counts. The judgment, too, being entered up as of last term, can we now set it aside?

PARK J. I come to the same conclusion, with considerable reluctance, under the circumstances of this case. (a) I am also of opinion, after sending to the Court of King's Bench, that the practice which requires the objections to an award to be specified in the rule *nisi* for setting it aside is not conclusive to prevent the

(a) It appeared from affidavits to other points to be a case of much hardship on the Defendant.

Court from entering into the objections, although not so specified. But passing by any formal errors, I think the finding of the arbitrator is on all the causes of action referred to him, and that, therefore, this rule must be discharged.

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BURROUGH J. said, that it was without doubt the practice of this Court to specify the objections to an award in a rule *nisi* for setting it aside, but concurred in thinking this award sufficiently certain.

GASELEE J. The practice is not inflexible; but, at all events, here the objection would have been stated without success. The arbitrator finds that the Plaintiff had *good cause* (not *a good cause*) of action for 23*l.* 14*s.* 10*d.* That is the same thing as if he had said, good cause of action to the extent of 23*l.* 14*s.* 10*d.* On the face of the award, therefore, the judgment applies to the whole of the declaration, and this rule must be

Discharged.

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Nov. 28.

BEDINGTON v. BEDINGTON.

The Court discourages the practice of ordering *nihil* to be returned to a *scire facias*.

THE Plaintiff left a writ of *scire facias* with the sheriff, to be returned *nihil*.

The sheriff having omitted to return the writ, because the Plaintiff refused to pay a sum of 6s. 8d. more than what he considered the regular fee,

Wilde Serjt. obtained a rule calling on the sheriff to shew cause why he should not return the writ, and pay the costs of the motion.

The sheriff thereupon returned the writ, but

Russell Serjt. shewed cause against that part of the rule which called for the costs of the motion; and read affidavits, in which the sheriff attempted to shew he had demanded no more than was usual.

BEST C. J. thought that the demand had been improperly made; but advertng to the circumstance that the Plaintiff had ordered the writ to be returned *nihil*, and animadverting on the mischief and injustice of proceeding on writs, of which the Defendant never received any notice, considered that both parties were to blame. With a view, therefore, to discourage the practice of ordering returns of *nihil*, the Court discharged the rule without costs.

Rule discharged accordingly.

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WEBB, Demandant; LANE, Tenant.

Nov. 28.

IN this writ of right a blank having been left in the Judgment count for the word *esplees*, and no *London* attorney's name being indorsed on it, but only the name of a *Plymouth* attorney, judgment was signed by the tenant, which

Judgment signed in a writ of right, because a blank was left for the word *esplees* in the count, set aside.

Wilde Serjt. obtained a rule *nisi* to set aside as irregular.

Taddy Serjt., who shewed cause, contended that the count was ill, on account of the above omissions; and that it was not the practice to permit amendment in a writ of right. *Charlwood v. Morgan.* (a)

Per Curiam. This was not an irregularity for which the tenant could take judgment, and the demandant may amend, on payment of costs.

(a) 1 N. R. 66.

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Nov. 28.

Lord FALMOUTH v. GEORGE.

1. Keeping up a capstern and rope in a cove to assist boats in landing, and without which they could not safely land in bad weather, Held, a good consideration for a reasonable toll on all boats frequenting the Cove, whether they used the capstern or not; and the custom to exact the toll held good, although the party claiming it was neither owner of the cove nor lord of the manor, nor were his predecessors shewn to have been such; but he and they had always been owners of the spot on which the capstern stood, and of an estate in the neighbourhood.

2. Held, that a fisherman frequenting the cove was not a competent witness for a party resisting the toll.

IN this action the Plaintiff sought under a custom to establish a claim to the second best fish out of every boat load of fish landed in *Senan Cove* in *Cornwall*.

At the trial before *Burrough J.*, last *Cornwall* Spring assizes, a custom was proved under which the Plaintiff and his ancestors had maintained a capstern and rope, which was sometimes used by the fishermen to draw up their boats to a place out of the reach of the tide, in *Senan Cove*. The Plaintiff insisted, and the jury found, that whether the capstern and rope were used or not the Plaintiff was entitled to the second best fish out of every boat-load landed in the Cove. In certain states of the tide, and in tempestuous weather, boats could not be drawn up from the sea with safety to the crews without the assistance of the capstern and rope.

Senan Cove, except the small part on which the capstern stood, was the soil of a *Mr. Williams*. But it appeared that the part on which the capstern stood had been in the possession of the Plaintiff and his ancestors (who were the owners of a farm in the neighbourhood called *Penrose Farm*) for as long a period as the oldest witnesses could recollect, and that this part was separated from the rest of the Cove by a wall that surrounded the capstern. The space between this wall and the sea, over which the boats were drawn by the capstern, was left entirely open, and was the property of the person to whom the rest of the Cove belonged. It also appeared that *Senan Cove* was rendered a proper place for the landing of boats by human labour: that

rocks

rocks had been removed, and a track made for the hauling up boats to a place above the reach of the tide.

At the trial it was proposed to examine as a witness for the Defendant, to disprove the custom, a person who admitted that he was then a fisherman frequenting *Senan* Cove. The learned Judge rejected this person's testimony.

A verdict having been found for the Plaintiff,

Bosanquet Serjt. in *Easter* term obtained a rule *nisi* to set it aside, on the ground that no consideration had been shewn in support of the custom, at least as against boats that did not use the capstern, and that the testimony of the fisherman ought not to have been rejected.

Wilde Serjt. shewed cause. The circumstances of *Senan* Cove having been made by art, and of the owners of *Penrose* estate having always possessed the soil on which the capstern stood, and having always repaired it, are sufficient to raise a presumption that the soil of the whole Cove formerly belonged to them. If so, the toll exacted would be a toll traverse, for which no consideration need be shewn, *Fitz. N. B.* 227. *Com. Dig. Toll* (D). In *Lord Pelham v. Pickersgill* (a), *Ashhurst* J. says, "Toll thorough cannot be supported without shewing a consideration; but toll traverse may; and the reason is, that the very circumstance of passing over the soil of a private person, where the public had no right before to pass, imports a consideration."

Although in order to constitute a toll traverse the soil and the toll both ought originally to have been

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(a) 1 T. R. 667.

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in the same hands, yet tolls have been supported in many cases where they have been severed from the ownership of the land, and their original union could only be matter of presumption. Thus, in *Rickards v. Benett* (a), where, in an action of trespass, the lord of a manor set out various burdens borne by him, and then prescribed, not by reason of those burdens, but generally as lord of the manor, for a toll upon all goods bought and delivered, or bought elsewhere and brought into and delivered in a town within the manor, which from time immemorial had been parcel of the manor, It was held, after verdict, that this was good as claim of toll traverse, although the burdens set out did not constitute a sufficient consideration for a toll thorough. It was also held, that where a legal commencement of a prescription can be presumed, that, after verdict, is sufficient to support the claim. *Crispe v. Belwood* (b) is to the same effect.

But if it be necessary to shew a consideration, sufficient consideration has been shewn here. *Senan Cove* has been made a landing-place by art, and *The Mayor of Yarmouth v. Eaton* (c) has decided that the making a port is a good consideration for the exaction of a toll. Even the repairing of the capstern, which is necessary to the safety of boats frequenting the Cove, is a sufficient consideration: *Colton v. Smith*. (d) In that case a prescription as lord of the manor for toll of goods landed within the manor, in consideration of repairing a wharf within the manor, was holden good.

Then, as to the rejection of evidence, the fisherman was properly excluded because he frequented *Senan Cove*; and a verdict in favour of the Plaintiff would have been evidence against the witness in another action of


(a) 1 B. & C. 223.

(b) 3 Lev. 424.

(c) 3 Burr. 1402.

(d) Cowp. 47.

the same custom: *City of London v. Clerke* (a), *Carpenters' Company v. Hayward* (b), *Hockly v. Lambe* (c), *Earl of Clanrickard v. Denton*. (d)

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Bosanquet. Although a toll traverse may be taken after it has been severed from the ownership of the land in respect of which it originally accrued, yet, in order to sustain it, it must be proved, and not merely presumed, that it was originally united with the land. A toll can only be proved to be a toll traverse by shewing that it either is or has been united to the ownership of the soil; but to presume that it has been so united, merely because it is paid, is to beg the question in dispute, and in effect to abolish the distinction between toll traverse and toll thorough.

In *Crispe v. Belwood*, *Colton v. Smith*, *Lord Pelham v. Pickersgill*, and *Rickards v. Benett*, the original union of the ownership of the land and tolls was proved by the circumstance that the party claiming the tolls was lord of the manor, in whose predecessors the lands of the manor were originally vested. "And it may be intended that all the lands within the manor are demesnes of the manor, for so they were at first, till the lord divided them among his tenants." (e)

But the present is a toll thorough, for which a consideration must be shewn: 22 Ass. 58. *Smith v. Shepherd* (f): and "courts are exceeding careful and jealous of these claims of right to levy money upon the subject: these tolls began and were established by the power of great men:" *Truman v. Walgham*. (g)

Then, the consideration shewn is insufficient even if the Defendant had used the capstern; for in *Warren*

(a) *Cartb.* 181.

(b) *Dougl.* 374.

(c) 1 *Ld. Raym.* 731.

(d) *Eagle and Young's Tithe Cases*, 306.

(e) 3 *Lev.* 424.

(f) *Moore*, 574.

(g) 2 *Wils.* 299.

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v. *Prideaux* (a), a prescription to have a bushel of salt of every ship that came laden with salt within a certain port, in consideration of maintaining the quay and keeping a bushel to measure the salt, was holden ill; and *Hale* C. J. said, "If any man will prescribe for a toll upon the sea, he must allege a good consideration, because by *Magna Charta* and other statutes every one hath a liberty to go and come upon the sea without impediment." But with respect to persons who are not shewn to have used the capstern, the keeping it up is clearly no consideration. In *Haspurt v. Wells* (b), a claim of toll for all ships passing by the plaintiff's wharf and crane was held unsustainable for want of consideration. In *The Mayor of Yarmouth v. Eaton* the claim of toll was in respect of corn exported from the port of *Yarmouth*, and the defendant would have been unable to ship his cargo but for the convenience of the port. But no case can be cited of a toll thorough being sustained where it has not been exacted in respect of some benefit to the party charged; or a toll traverse, where the soil in respect of which the toll is claimed has not been shewn at some time to have belonged to the owner of the toll.

Then, the testimony of the fisherman ought not to have been excluded. The Plaintiff's claim is in respect of a private right accruing to him by prescription, and not under a custom affecting the public. If this witness were properly excluded, no man could ever establish a prescriptive right of road by any witnesses who had occasion to use the track in question; and few or none other would know any thing about it. So here the fisherman ought to have been admitted, if for no other reason, from the necessity of the case. It was impossible for any one to speak to the usage in respect of the capstern but such as frequented the cove, and against all such the Plaintiff made his claim.

(a) 1 *Mod.* 104.

(b) 1 *Mod.* 47.

BEST C. J. The Plaintiff claimed the second best fish out of every boat load of fish that was landed in *Senan Cove*.

This claim was founded on a custom under which the Plaintiff and his ancestors had maintained a capstern and rope, which were sometimes used by the fishermen to draw up their boats to a place out of the reach of the tide. The Plaintiff insisted, and the jury found, that whether the capstern and rope were used or not, the Plaintiff was entitled to this toll. In certain states of the tide, and in tempestuous weather, boats could not be drawn up from the sea with safety to the crews without the assistance of the capstern and rope.

Senan Cove, except the small part on which the capstern stood, was the soil of a Mr. *Williams*. But it appeared that the part on which the capstern stood had been in the possession of the Plaintiff and his ancestors (who were the owners of a farm in the neighbourhood called *Penrose Farm*,) for as long a period as the oldest witnesses could recollect, and that this part was separated from the rest of the Cove by a wall that surrounded the capstern. The space between this wall and the sea, over which the boats were drawn by the capstern, was left entirely open, and was the property of the person to whom the rest of the Cove belonged. It also appeared that *Senan Cove* was rendered a proper place for the landing of boats, by human labour: that rocks had been removed, and a track made for the hauling up boats to a place above the reach of the tide.

It has been objected, that there was no consideration for the custom for taking toll from the owners of boats who did not make use of the capstern to draw up their boats from the sea.

Although it is not always necessary to use the capstern, yet if boats in certain seasons could not safely approach this place unless they were certain of having the

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the assistance of the rope of the capstern to draw them out of the surf of the sea, we think that the keeping of the capstern and rope ready for the use of fishermen who resort to this Cove is a sufficient consideration for a toll to be paid by them, whether they actually use it or not. No boats could put to sea with any thing like safety if proper means were not provided to draw them out of the breakers, in case a strong wind should set in towards the land.

Although the fishermen may not always use the capstern, it is of advantage to them. Nay, it is essential to their safety that it should be kept ready for them. The keeping of a capstern for such a purpose is a sufficient consideration for a reasonable toll.

There is no doubt that the King may at this time establish a reasonable toll for the performance of any duty that the public convenience or safety requires should be performed.

The creation of a toll is only a mode of paying for a public service. The power of creating tolls depends upon the necessity of the service and the reasonableness of the toll taken for it. If the service be not of public advantage, or the toll be unreasonable, it cannot be supported. But it is impossible to contend that this capstern and rope is not of the greatest importance to these fishermen. And it was not suggested, either at the trial or in the argument here, that the toll demanded was excessive or unreasonable. If the Plaintiff had purchased this land a year ago, had made a landing place in this Cove, had built a capstern, provided a proper rope, and undertaken to keep the capstern and rope in a proper state at all times for the use of the fishermen, it would have been a sufficient consideration for the grant of such a toll by the crown, as the jury have found was due to the Plaintiff by virtue of a custom.


Now

Now it is well known that many tolls are good under a custom of which a good grant could not be made at the present time. A custom which is proved to have existed immemorially will be good, if it be of such a nature that it is possible it can have had a good beginning. Although it be such as to confer what the King cannot now grant, yet, if it be not contrary to reason, it may be supported; for it might have had its commencement from an act of the legislature. Custom is a local law which supersedes the general law; and if the law give us the maxim *consuetudo ex certâ causâ rationabili privat communem legem*, the custom on which the Plaintiff rests his claim appears to us to be reasonable and convenient even to those who resist its establishment; advantageous to the public, by encouraging a valuable fishery; and highly beneficial, as tending to the preservation of human life.

We have, therefore, no doubt that this is a valid custom. In the case of *The Earl of Falmouth v. Penrose* (a), the validity of the custom was never disputed; the objection there taken was, that the pleadings were not applicable to the case proved.

At the trial it was proposed to examine a man as witness for the defendant to disprove the custom, who admitted that he was then a fisherman frequenting *Senan Cove*. My learned Brother rejected this person's evidence, and we are of opinion that he was not a competent witness. Although the declaration did not set out the custom, yet, as the Plaintiff claimed his right upon a custom, and the defence consisted in a denial of it, the judgment in this case, with evidence shewing that the question at the trial was whether there was a custom or not, would be admissible, should an action be brought against the witness for landing fish in *Senan Cove*, without paying the toll.

(a) 6 B. & C. 385.

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Wherever customs are set up, judgments in causes between other parties are admissible in evidence to prove or disprove such customs. The witness had, therefore, a direct and immediate interest to obtain a verdict for the Defendant, as he might use such a verdict to protect himself, in case an action should be brought against him for non-payment of tolls due on the landing of fish by himself. This point is expressly decided by the case of *The Company of Carpenters v. Hayward*, where witnesses were rejected who were called to prove they had worked as *carpenters* in *Shrewsbury*, though not free of the company. Lord Mansfield said, "If the Company had failed in establishing the custom, the witnesses would have been discharged from actions to which they were liable for the breach of it." We do not mean to say that an intention to bring fish into *Senan Cove* immediately after the cause was tried, or the having brought fish there without paying the tolls so long ago as that those who brought them were protected by the statute of limitations, would render witnesses incompetent. The former have no interest, and the interest of the latter, like that of an heir at law, is future and contingent. If such persons were not competent witnesses, few, who had any knowledge on the subject, could be received, who could disprove a toll thorough or a toll traverse. We put the incompetency of the witness upon the ground of his immediate liability to an action in the event of the verdict being for the Plaintiff, and his being relieved from that liability by a verdict for the Defendant. We are of opinion that the rule for a new trial must be discharged.

Rule discharged accordingly.

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ELWORTHY and Others v. THOMAS MAUNDER.

Nov. 28.

THE Defendant was arrested and holden to bail on the following affidavit: — “ *William Elworthy of Wellington, in the county of Somerset, woollen manufacturer, maketh oath and saith, that by a memorandum in writing, bearing date the 11th day of August 1828, and signed by Thomas Maunder of Crediton, in the county of Devon, farmer, the said Thomas Maunder did undertake and agree to be answerable to the creditors of certain persons using the style and firm of William Maunder and James Maunder for the amount of the debts of such creditors on their (the said creditors) undertaking not to issue a commission of bankrupt, or sue out process against them the said W. Maunder and J. Maunder, on or before Saturday, the 16th day of August, then instant; and this deponent further saith, that he and one Thomas Elworthy the elder, and one Thomas Elworthy the younger, trading together as co-partners, and using the style and firm of Messrs. Thomas Elworthy and Co., were and now are creditors of the said W. Maunder and J. Maunder; and that they, the said W. Maunder and J. Maunder, were on the 11th day of August, instant, and still are, indebted to this deponent and the said Thomas Elworthy the elder, and Thomas Elworthy the younger, in a certain large sum of money, to wit, the sum of 1000*l.* and upwards, that is to say, the sum of 800*l.*, on a bill of exchange, drawn by the said W. Maunder and J. Maunder upon one Joseph Lambert*

*W. M. nor defendant paid Plaintiffs the 1000*l.* due to them from J. and W. M.; and that Defendant owed Plaintiffs 1000*l.* upon his said undertaking;*

Held, insufficient to hold Defendant to bail.


Affidavit, that the Defendant had undertaken to be answerable to the creditors of J. and W. M. for the amount of the debts of such creditors, on their, the creditors, undertaking not to issue a commission of bankrupt against J. and W. M. before the 16th of August; that J. and W. M. owed Plaintiffs 1000*l.*; that neither Plaintiffs, nor, as they were informed and believed, any other of the creditors of J. and W. M. sued out a commission of bankrupt against J. and W. M. before the 16th of August; that neither J. and

and

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and payable to the order of the said Messrs. *Thomas Elworthy* and Co., at a certain day now past, and in the further sum of 700*l.* and upwards, for goods sold and delivered by this deponent and the said *Thomas Elworthy* the elder, and *Thomas Elworthy* the younger, to the said *William Maunder* and *James Maunder*, and at their request; and this deponent further saith, that he, confiding in the said undertaking and agreement of the said *Thomas Maunder*, did not, nor hath the said *Thomas Elworthy* the elder, and the said *Thomas Elworthy* the younger, or either of them, nor have nor hath (as this deponent is informed and believes) any or either of the other creditors of the said *W. Maunder* and *J. Maunder* caused a commission of bankrupt to be issued, or sued out any writ or other process against them the said *W. Maunder* and *J. Maunder*, or either of them, on or before the said 16th day of *August*, yet that the said *Thomas Maunder* (although often requested so to do) hath not, nor have the said *W. Maunder* and *J. Maunder*, or either of them, as yet paid the said sum of 1000*l.*, or upwards, or any part thereof, to this deponent, or to the said *Thomas Elworthy* the elder, or *Thomas Elworthy* the younger, or either of them, but that the same still remains wholly due and unpaid; and this deponent further saith, that the said *Thomas Maunder* is justly and truly indebted to this deponent, and the said *Thomas Elworthy* the elder and *Thomas Elworthy* the younger, in the said sum of 1000*l.* and upwards, upon and by virtue of the said memorandum, and the undertaking and agreement of the said *Thomas Maunder* therein mentioned; and this deponent lastly saith, that no offer hath been made to this deponent, or to the said *Thomas Elworthy* the elder, and *Thomas Elworthy* the younger, or either of them, by the said *Thomas Maunder*, or by the said *William Maunder*, or either of them, to pay the said sum of 1000*l.*
and

and upwards, or any part thereof, in any note or notes of the Governor and Company of the Bank of *England* expressed to be payable on demand."

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A rule *nisi* was obtained for delivering up the bail-bond to be cancelled, on the ground that the Defendant's liability to the Plaintiffs, if he was liable at all, depended on the performance of a condition precedent, namely, an undertaking by all the creditors of *James and William Maunder* not to sue out a commission of bankrupt against them before the 16th of *August*, and the affidavit contained no averment that any such an undertaking had been given, nor even (except upon information of others) that all the creditors had actually abstained from suing out a commission during that period. It was also objected that it did not appear that the Plaintiffs were so much as parties to the agreement.


Jones and Stephen Serjts., who shewed cause, endeavoured to answer these objections; but

Wilde Serjt., in support of the rule, having referred to *Phillipps v. Bateman* (a), where a general undertaking, "to be accountable for the payment of the notes issued by the *Milford* bank, as far as the sum of 30,000*l.* will extend to pay," was holden not to confer a right of action to an individual holder of such notes; and to *M'Pherson v. Lovie* (b), where the Court set aside a bail-bond taken on an affidavit "that the defendant had promised to pay plaintiff 1000*l.* if he did not marry her in *March* or *April* next; that she was ready to be married to him, but that he neither married her in *March* nor *April* nor paid the 1000*l.*," because, no similar promise by the Plaintiff

(a) 16 *East*, 356.

(b) 1 *B. & C.* 108.

being

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being averred, it did not appear that there was any consideration for the Defendant's promise,

The Court held, that in any view of the case an undertaking by all the creditors of *James* and *William Maunder* not to sue out a commission against them was a condition precedent to any liability to be incurred by the Defendant; and that the performance of such condition not having been alleged in the affidavit (*a*), the rule must be made

Absolute.

(*a*) No such undertaking was ever given by all the creditors, as appeared by other affidavits filed in support of the rule.

MEMORANDA.

In the course of this term *James Parke*, Esquire, was called to the degree of the *coif*, and gave rings with the following motto: — “*Tenax justitiæ*,” and on the same day took his seat as one of the puisne Judges, in the Court of King's Bench.

Thomas Denman, Esquire, received a patent of precedence.

END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

1829.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

In the Ninth and Tenth Years of the Reign of
GEORGE IV.

ABBEY v. LILL.

Jan. 24.

ACTION to recover 3*l.* 6*s.*, remaining due upon a bill of exchange for 8*l.* 6*s.*, with interest, which bill had been given to secure the balance of an account between the Plaintiff and Defendant, originally amounting to 400*l.* The declaration contained also a count upon an account stated. The business to which the account related had been transacted in *London*.

At the trial before *Best* C. J., *London* sittings after *Hilary* term, the only evidence in support of the Plain-

Boston Court of Conscience Act, if the account originally exceeded 5*l.*, although the sum sought to be recovered is less than 5*l.*

1. *Semble*,
That a post-mark may be proved by any one in the habit of receiving letters by the post.

2. An action to recover the balance of an account is not within the

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tiff's

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tiff's demand was a letter from the Defendant, which, provided it were written in 1825, contained a sufficient acknowledgment to entitle the Plaintiff to a verdict. The letter, however, was dated by the writer *January 1824*.

To shew that it was written in 1825, and that the figure 4 had been put for 5, by a mistake common at the commencement of every new year, the plaintiff relied on the postmark. To this it was objected, on the part of the Defendant, that the mark itself was not clear; and that, at all events, the genuineness of a postmark could only be established by calling a person from the post-office.

The learned Chief Justice said, that if there were any doubt about the genuineness of the mark, he would send for a clerk from the post-office.

The jury, however, entertained no doubt about the genuineness of the mark, or the date intended, and gave their verdict for the Plaintiff.

Wilde Serjt. obtained a rule *nisi* to set aside this verdict, upon the ground that the postmark had been improperly taken as evidence; or to enter a suggestion under the *Boston Court of Conscience Act*, 47 G. 3. sess. 2. c. 1. s. 18. (a), to deprive the Plaintiff of his costs, upon

(a) By the *Boston Court of Conscience Act*, 47 G. 3. c. 1. s. 18. it is enacted, "That it shall and may be lawful to and for any person or persons (whether such person or persons shall reside within the jurisdiction of the said Court or not) having any debt or debts, on the balance of account or otherwise howsoever, not exceeding the value of five pounds, due or owing or belonging to him, her, or them, by or from any other person or persons whatsoever inhabiting, residing, or being within the said borough or parish of *Boston*, or

keeping or using any house, warehouse, wharf, quay, lodging, shop, shed, stall, stand, or using or frequenting the markets there, or seeking a livelihood, or in any way trading or dealing within the same, to apply to the clerk of the court for the time being, or his deputy, who shall immediately make out and deliver to one of the serjeants of the said court for the time being a summons in writing," &c. And,

By section 41. it is also enacted, "That if any action or suit for any debt recoverable by virtue of

upon an affidavit that the defendant lived within the jurisdiction of that court.

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Jones Serjt. shewed cause. The postmark was properly admitted in evidence. It is true that in *Rex v. Watson* (a) Lord *Ellenborough* refused to allow a *Middlesex* postmark, unauthenticated, to be proof of publication in *Middlesex* of a libel contained in the letter; that, however, was a criminal case. But in *Arcangelo v. Thompson* (b), where a policy, dated 1797, had been effected in the name of *S. Levy*, who was averred in the declaration to have been "the person residing in *Great Britain* who received the order for and effected the policy," the Plaintiff's counsel, to prove the order, gave in evidence a letter from him, dated *Trieste*, addressed to *Levy* in *London*, and having upon it the *English* ship-letter postmark, with the date of 1797: and Lord *Ellenborough* held, after argument, that this was sufficient evidence of the receipt of the order by *Levy* before the effecting of the policy:

And though in *Fletcher v. Braddyl* (c) a postmistress was called to prove a postmark, yet she was not the person who made it, and, therefore, could have no other knowledge of the genuineness of the mark, than its general appearance; a knowledge which is possessed in an equal degree by every one in the habit of receiving letters by the post.

of this act in the said court of requests shall be commenced in any other court whatsoever, or elsewhere than in the said court of requests, then and in every such case the plaintiff or plaintiffs in such action or suit shall not by reason of a verdict for him, her, or them, or otherwise have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants

in such action or suit, and the judge or judges before whom the same shall be tried or heard shall think fit to certify that such debt ought to have been recovered in the said court of requests, then and in every such case such defendant or defendants shall have costs," &c.

(a) 1 *Campb.* 214.(b) 2 *Campb.* 620.(c) *Stark. Ev. Appx.* 4 to 853.

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But here the question of law is superseded by the offer of the Chief Justice to send to the post-office, if such a mode of proof were required.

With respect to the suggestion, the fifteenth section of the *Boston* act expressly excludes actions brought to recover the balance of an account originally exceeding five pounds. It provides, "That nothing in this act contained shall extend, or be construed to extend, so as to enable the said commissioners to decide on any debt for any sum being the *balance of an account* or demand *originally exceeding* five pounds."

Wilde. The postmark ought to have been proved by some one who could speak positively to its genuineness; it was not enough that the jury assumed it to be genuine; they had no grounds for doing so, and the Court cannot take judicial notice of such a mark. The rules of evidence are the same in civil as in criminal cases, and *Rex v. Watson* is in point. In *Arcangelo v. Thompson*, the proof required was complete by the contents of the letter, without the postmark, and, therefore, the genuineness of the mark was not questioned. But in *Fletcher v. Braddyl* a postmistress was called, as being skilled in the knowledge of such marks. [*Gaselee J.* Is not that decisive? every one is cognizant of the mark.]

Then, as to the *Boston* act; the fifteenth section is far from being precise, while the fourteenth section seems expressly to include such a case as the present. That section enacts, "That it shall and may be lawful to and for the said commissioners, and they are hereby enabled to decide and determine *all* disputes and differences between party and party, for any sum not exceeding five pounds, in all actions or causes of debt, whether such debt shall arise on any promissory note or inland *bill of exchange*, or for rent upon leases, articles,

articles, minutes, and in all cases of *assumpsit* and *insimul computasset*," &c., and by section 17. it is " Provided that in case any plaintiff who shall have split or divided such his or her cause or action, shall be willing to accept such sum of money as the said court is in and by this act enabled to adjudge, decree, and pronounce, in full of the whole of his or her demand in such cause or action so split or divided, then and in every such case the said commissioners shall and may adjudge, decree, and pronounce (on such plaintiff proving his or her cause or case to the satisfaction of the said commissioners) such sum to the plaintiff, not exceeding the sum of five pounds, as to the said commissioners shall seem just and reasonable; and such sum shall, in the judgment or decree to be pronounced by the said commissioners, be declared to be, and shall be, in full discharge of all demands from the defendant to the plaintiff in such cause or case so split or divided."

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BEST C. J. The jury were satisfied that the mark on this letter was the post-office mark; but the question is, Whether it was necessary that that fact should have been proved? and by whom? Certainly not by the postmaster of another office; for he would know no more of the mark than any other individual; so that in *Fletcher v. Braddyl* the proof was carried no farther than in the present case. If there be any doubt as to the genuineness of the mark, the person who made it is the best witness to be called; the knowledge of all other persons on the subject is equal; but I should be slow to say, that a witness should be called to a distance, from *London*, or *Cumberland*, perhaps, to prove the postmark of every letter, the date of which may be disputed.

However, in the present case, I do not decide the point: I decide on the ground that I offered to send to

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the post-office for the person who made the mark, but, such strictness of proof was then no longer insisted on. Then, is this a case within the *Boston* act? If that act had been confined to cases where the Plaintiff and Defendant both lived in *Boston*, I should have been disposed to give it the fullest effect; but I am unwilling to make *Boston* a place of refuge for debtors, where the debt has been incurred in *London*. Such an act ought to receive a strict construction; but this case is taken out of it by the provision in the fifteenth section, the action having been brought to recover the balance of an account originally exceeding five pounds.

GASELER J. (a) Under the circumstances of this case I think the rule ought to be discharged. I do not lay it down that a postmark is to be taken to be genuine, without regular proof.

In general, the mark is not disputed; but where it is disputed, it ought, perhaps, to be proved, though what might be deemed to amount to proof is not clear; a postmistress of another office having been allowed to give evidence on the point, while persons who live in *London*, and see the mark every day, are on that account, perhaps, as competent to speak concerning it as such a postmistress. But here, as the Chief Justice offered to send to the post-office, and was not required to do so, the objection seems to have been waived.

As to the suggestion, the bill of exchange, on which the action was brought, was given to secure the balance of an account originally exceeding five pounds; the case, therefore, falls clearly within the provision of the fifteenth section, and the rule must be

Discharged.

(a) *Park J.* was absent on account of illness; and *Burroughs J.* was at chambers, but concurred in the judgment of the Court.

1829:

FERGUSON v. CRISTALL and Another.

Jan. 24.

THE Plaintiff, a ship-owner, who had let out his ship on a charter-party, declared upon an alleged injury to his reversionary interest in the ship and its tackle. He also added a count in trover for anchors and cables.

At the trial before *Best C.J.*, *London* sittings after *Trinity* term, it appeared that *Fraser, Living, and Co.* had chartered the Plaintiff's ship for three voyages: that upon her return home at the end of the first voyage, the charterers with considerable speed removed the anchors and cables from the ship to the Defendant's wharf alongside: that very soon after this had been done, on the 8th of *December* 1827, the ship was arrested under an admiralty warrant, by the holder of a bottomry bond, given by the charterer's captain for the equipment and outfit of the ship, and also for provisions, which latter, with the pay of the crew, the charterers were bound under the charter-party to provide.

Subsequently to *December* other warrants were lodged against the ship, for the pay of the crew, &c. to the amount of 2100*l.* more. A decree of sale was given the 21st of *March*, and the ship was sold on the 1st of *April* 1828.


On the 28th of *March* 1828, the Plaintiff demanded the anchors and cables of the Defendants, who refused to give them up, alleging that they did not know the Plaintiff in the business.

the Defendant the anchors and cables on his wharf, which the Defendant, holding them from *F.*, refused to give up:

Held, that on this demand, previous to the sale, the Plaintiff could not sue the Defendant for the anchors and cables in trover, although they had not been removed out of the ship in the ordinary course of business: Held, also, that the removal of them from the ship to the wharf, whereby they escaped the admiralty sale, was no injury to the Plaintiff's reversionary interest.

F., who had hired a ship and its tackle of the Plaintiff for three voyages, at the end of the first, being apprehensive of a seizure under the process of an admiralty court, placed the cables and anchors on the Defendant's wharf, alongside of which the ship lay. The ship was then seized for seamen's wages and a debt on bottomry, and shortly afterwards was sold under admiralty process, without the anchors and cables.

Two days before the sale, the Plaintiff demanded of

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It was contended that the anchors and cables had been improperly removed from the ship to avoid the admiralty process: that if they had remained on board, and had been seized and sold with the ship, a surplus would have remained upon the sale, after satisfying the admiralty demands, and that the Plaintiff's reversionary interest expectant on the determination of the term granted by the charter-party was injured to the extent of that surplus: or that at all events, by the improper removal of the anchors and cables from the ship, the right to the possession of them re-vested in the Plaintiff sufficiently to support his count in trover.

To this it was answered, that the charterers had in the ordinary course of business a right to remove the anchors and cables from the ship to the wharf: that it was not easy to see how the Plaintiff's reversionary interest was injured by the anchors and cables *not* having been seized and sold: and that according to the terms of the charter-party he could have no right to the possession of them till the expiration of the three voyages, so that there was no evidence to support the count in trover.
Gordon v. Harper. (a)

The learned Chief Justice left it to the jury to consider, first, Whether the anchors and cables had been taken out of the vessel for a legitimate purpose, or to avoid the process of the court of admiralty? and,

Secondly, if so, Whether the Plaintiff had sustained any injury?


The jury found that the anchors and cables had not been removed in the ordinary course of business, and that the Plaintiff had been injured to the extent of 244*l.* 15*s.*, the value of the anchors and cables, for which sum they give their verdict.

Wilde Serjt. on the arguments urged for the Defendants at the trial, obtained a rule *nisi* to set aside this

(a) 7 T. R. 9.

verdict

verdict and enter a nonsuit instead: he referred to *Jackson v. Pesked* (a), to shew that to entitle a party to recover for an injury to the reversion, the injury must be of a permanent nature.

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Merewether Serjt. now shewed cause. He put the injury to the reversion on the same ground as at the trial; and to shew that the Plaintiff could support the count in trover, he cited *Loeschman v. Machin* (b), where the hirer of a piano, who sent it to an auctioneer to be sold, was holden to be guilty of a conversion; as also an auctioneer who refused to deliver it up unless expences incurred were first paid.

BEST C. J. I was clearly of opinion at the trial that the count in trover could not be supported, and am still of the same opinion. Trover will not lie for the Plaintiff, because, according to the principle laid down in *Gordon v. Harper*, he had no right to the possession of the goods till the period for which he had let them, under the charter-party, expired. It has been contended, indeed, that his right to the possession of them reverted upon their being removed from the ship with which they were let; and I agree that this might have been so, if the removal, as in the case of *Loeschman v. Machin*, had been a wrongful removal: but here, though not removed in the ordinary course of business, they were placed on the Defendant's wharf ready for the use of the ship. So likewise, had they been demanded subsequently to the sale of the ship, the Plaintiff might, perhaps, have sued in trover; but they were demanded two days before the sale, and at that time it was not certain that *Fraser* and *Living* might not require them again for the use of the ship. Till the sale of the ship, at least, the Defendants, who

(a) 1 M. & S. 234.

(b) 2 Stark. N. P. C. 311.

had

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had received the goods from those who had a right to the possession, could not be esteemed wrongdoers in retaining them for the only persons they knew in the business.

With respect to the alleged injury to the reversion, if the jury had found that the goods had been injured, there might have been some ground for the action; but the mere removal of them was not such an injury as to entitle the Plaintiff to sue in that respect. The rule for a nonsuit must be made absolute.

BURROUGH J. (a) There is no evidence of any conversion by the Defendants after the sale of the ship, before which the Plaintiff was not entitled to the possession, so that the count in trover falls to the ground. Nor was there any such injury to the Plaintiff's reversion as to give him a right to sue for damages.

GASELEE J. It is clear no action lies for the supposed injury to the Plaintiff's reversion; and, with respect to the count in trover, this case differs essentially from that of *Loeschman v. Machin*; because there the defendant, an auctioneer, received the goods for an improper purpose, and made himself a party by insisting on retaining them until his expences were paid. Here, when the goods were delivered to the Defendants, *Fraser* and *Living* had the entire control over them; so that, unless it could be shewn that they had improper intentions as against the Plaintiff, their right to place them with the Defendants could not be disputed. If *Fraser* and *Living* had paid the demand in the admiralty court, as they might have done, the goods were theirs for the time mentioned in the charter-party. At all events the Plaintiff had no title to the possession of them till the ship was sold.

Rule absolute.

(a) *Park J.* was absent, being unwell.

1829.

(IN THE EXCHEQUER CHAMBER.)

WILLIAMS v. PROTHEROE.

Jan. 29.

ERROR from the Court of King's Bench. The declaration stated that, whereas on the 14th day of *December*, in the year 1823, at *Chepstow*, in the county of *Monmouth*, by a certain agreement then and there made between the said *Edmund Williams*, the Defendant, of the one part, and the said *Thomas Protheroe*, the Plaintiff, of the other part, the date whereof was the day and year aforesaid, the said *Edmund* for himself, his heirs, executors, and administrators, in consideration of the sum of 1300*l.* to be paid to him or them, on the 2d day of *February* then next ensuing the date thereof, by the said *Thomas*, did thereby agree with the said *Thomas*, his heirs and assigns, to sell and convey to him the said *Thomas*, his heirs and assigns for ever, on the said 2d day of *February* then next, a certain freehold messuage or dwelling-house, and certain customary messuages, lands, &c. in the said agreement particularly mentioned and described, and the said *Thomas* for himself, his heirs, executors, and administrators, did thereby agree with the said *Edmund*, his heirs, executors, and administrators, to purchase the said freehold and customary messuages, lands, and hereditaments thereinbefore mentioned and described, and to pay the said *Edmund*, his executors and administrators, for the same, the sum of 1300*l.* on the said 2d day of *February* then next, on having the same conveyed and surrendered to him the said *Thomas*, his heirs and assigns, by the said *Edmund* or his heirs, — and it was further agreed that the

An agreement between the seller and purchaser of an estate, that the purchaser, bearing the expence of certain suits commenced by the seller against an occupier for arrears of rent, should have the rent to be so recovered, and any sum that could be recovered for dilapidations, and that the purchaser, bearing the expences, might use the seller's name in actions he might think fit to commence against the occupier for arrears of rent or dilapidations, is not void, as savouring of champerty.

said

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said *Thomas* should bear all the expence, costs, and charges of the conveyance and surrender to him of the said freehold and customary hereditaments and premises, and of any fines, recoveries, or other assurances necessary to convey and surrender the same respectively, and it was further agreed by and between the said parties thereto, that the said *Edmund*, his heirs, executors, and administrators, should receive the rents and pay all outgoing, in respect of the said freehold hereditaments, up to the said 2d day of *February* then next; and, after reciting *that proceedings, both at law and in equity, were then pending between the said Edmund and Sir Henry Protheroe, in which proceedings at law the said Edmund was Plaintiff, and sought to recover from the said Sir H. Protheroe six years' rent, at 80l. per annum, due the 2d day of February then last, for and in respect of the said customary hereditaments and premises, under and by virtue of a certain agreement made between the said Edmund and the said Sir H. Protheroe, it was by the said agreement, further agreed and declared by and between the said parties thereto, that the said Thomas, his heirs, executors, and administrators, should have and receive the said arrears of rent so claimed to be due from the said Sir H. Protheroe, for his and their own use and benefit, and also the said rent due from the said Sir H. Protheroe, or to become due for the current year, ending on the 2d day of February then next; and, also, that the said Thomas, his heirs, executors, and administrators, should have and be entitled to all sums of money that could be recovered from the said Sir H. Protheroe, for and in respect of dilapidations and wants of repair of and in the said customary hereditaments and premises; and it was thereby further agreed, that the said Thomas, his heirs, executors, and administrators, should be at full liberty to use the name or names of the said Edmund, his heirs, executors, and administrators, in the proceedings*

at

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*at law and in equity then pending between the said Edmund and the said Sir H. Protheroe; and, also, in any other action or actions, suit or suits, which he, the said Thomas, his heirs, executors, and administrators, should think proper to commence and prosecute against the said Sir H. Protheroe for the recovery of the said arrears of rent, or of the current year's rent, or for dilapidations, or wants of repair of and in the said customary hereditaments and premises; and it was thereby further agreed, that the said Thomas should bear, pay, and discharge the costs of the said Edmund in the proceedings then pending, and indemnify him, the said Edmund, his heirs, executors, and administrators, of, from, and against all costs and charges of any future proceedings that might be had by the said Thomas, in the name of the said Edmund, his heirs, executors, and administrators, against the said Sir H. Protheroe; as by the said agreement, reference being thereunto had, fully appears; and the said agreement being made as aforesaid, afterwards, to wit, on, &c., at, &c., it was, at the special instance and request of the said Edmund, agreed by and between the said Thomas and the said Edmund, that the price or money to be paid by the said Thomas to the said Edmund for the said freehold estate and tenement in the said articles of agreement first mentioned, should be a certain sum of money, to wit, the sum of 500*l.*, part of the said sum of 1300*l.*, and that the price or sum to be paid by the said Thomas to the said Edmund, for the said customary tenements and premises in the said agreement also mentioned, should be the residue of the said sum of 1300*l.*, to wit, the sum of 800*l.*, subject to the terms in the said agreement specified; and thereupon, afterwards, to wit, on, &c., at, &c., in consideration thereof, and that the said Thomas, at the like special instance and request of the said Edmund, had then and there undertaken and faithfully promised the said Edmund, to perform and fulfil all things in the said agreement contained, on his,*

the

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the said *Thomas's*, part to be performed and fulfilled as such purchaser as aforesaid, he, the said *Edmund*, undertook, and then and there faithfully promised the said *Thomas*, to perform and fulfil all things in the said agreement contained, on his, the said *Edmund's*, part and behalf to be performed and fulfilled as such vendor as aforesaid; and although the said *Edmund*, in part performance of the said agreement, and of his said promise and undertaking, did afterwards, to wit, on, &c., at, &c., sell and convey the said freehold tenements and premises in the said agreement first mentioned to the said *Thomas*, and his heirs and assigns, at and for the said sum of 500*l.*, and the said *Thomas* then and there paid the sum of 500*l.* to the said *Edmund*, upon the terms aforesaid; and although the said *Thomas* was afterwards, to wit, on, &c., and from thence hitherto ready and willing to accept, receive, and take of and from the said *Edmund*, a surrender to him, the said *Thomas*, of the said customary tenements and premises in the said agreement mentioned, at and for the said sum of 800*l.*, upon the terms aforesaid, and to bear all the expences, costs, and charges of such surrender, and all necessary assurances in that behalf, and to pay the said sum of 800*l.*, and complete the said purchase on his part and behalf in all respects upon the terms aforesaid, to wit, at, &c.; and although the said *Thomas* afterwards, to wit, on, &c., and often times afterwards, offered to the said *Edmund* to complete the said purchase of the said customary tenements and premises, with the appurtenances, upon the terms aforesaid, and requested the said *Edmund* to sell and surrender to him, the said *Thomas*, the said customary tenements and premises, upon the terms aforesaid, to wit, at, &c., yet the said *Edmund*, not regarding the said agreement, nor his said promise and undertaking, but contriving, &c., did not, nor would, on the said 2d day of *February*, in the year last aforesaid, or at any other time, surrender
 or

or convey to the said *Thomas* the said customary tenements and premises in the said agreement in that behalf mentioned, or any part thereof, upon the terms aforesaid, but the said *Edmund* wrongfully neglected and refused ever to surrender the said customary tenements and premises to the said *Thomas*, according to the said agreement, and wrongfully discharged the said *Thomas* from any further performance by him of the said agreement on his part, contrary to the agreement, and the said promise and undertaking of the said *Edmund*, to wit, at, &c.

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Then followed a statement of special damage.


There were several other counts. A general verdict was given for the Plaintiff below, upon which final judgment was entered up, without opposition in the court below.

Curwood for the Plaintiff in error. The first count discloses an illegal agreement, and the verdict and damages being general, the judgment below cannot stand. *Holt v. Scholefield.*(a)

The agreement presents a clear case of champerty. The statute of 3 *Ed.* 1. c. 25. against champerty enacts, that "No officer of the king by himself, nor by other, shall maintain pleas, suit, or matters depending in the king's courts, for lands, tenements, or other things for to have part thereof, or other profit, by covenant made; and he that so doth shall be punished at the king's pleasure."

The subsequent statute of 28 *Ed.* 3. c. 11. is as follows: "And further, because the king hath heretofore ordained by statute that none of his officers shall take any plea or champerty, and by that statute other than officers were not bounden before this time, the king willeth that no officer *nor any other*, for to have part of the thing in plea, shall take upon him any businesses that are in suit; nor

(a) 6 *T. R.* 691.

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none upon any such covenant shall give up his right to another: and if any so do, and he be attainted thereof, the taker shall forfeit unto the king so much of his lands or goods as doth amount to the value of the part that he hath purchased by such undertaking: and for such attainer whosoever will shall be received to sue for the king before the justices, before whom the plea shall have been; and the judgment shall be given by them. But it is not to be understood hereby that one may not have counsel of pleaders or of learned men (for his fee), or of his relations or neighbours."

Although the first of these statutes applies in terms to the king's officers only, yet it is extended by the second: both show the sense of the legislature with regard to the offences of maintenance and champerty, and have never in application been considered as limited to the king's officers.

Then, champerty is an offence punishable at common law, and an agreement which stipulates for the commission of an offence cannot be supported.

In *Chesman v. Nainby* (a) it was expressly holden, that "if a bond is given with condition to do a thing against an act of parliament, and also to pay a just debt, the whole bond will be void." *Norton v. Simms* (b). 1 *Wms. Saund.* 66a. n.(1). Here the stipulation that the Plaintiff below shall purchase the suit commenced by the Defendant below goes to the whole agreement, and renders it void.

The Court stopped the counsel for the Defendant in error, and holding that there was no champerty in an agreement to enable the *bonâ fide* purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase, more especially where such purchaser was not an officer of the king, the judgment of the court below was
 Affirmed.

(a) 2 *Ld. Raym.* 1459.

(b) *Hob.* 14.

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BUSHNELL and Others v. LEVI.

Feb. 4.

THIS was an action for work and labour performed in
Middlesex.

The Plaintiffs having obtained a verdict for 4*l.* 18*s.*,

Andrews Serjt., — on an affidavit, that the Defendant, at the time of the action and ever since, carried on the business of a sheriff's officer in *Fetter Lane*, in the city of *London*, under the firm of *W. Levi* and Son, and had rented offices or a counting-house and premises jointly with his son and partner in *Fetter Lane*, and had sought and endeavoured to get his livelihood within the said city of *London*, by his aforesaid business of sheriff's officer, — obtained a rule *nisi* to enter a suggestion under the *London* Court of Conscience Act (39 and 40 G. 3. c. 104.) to deprive the Plaintiff of his costs. He relied on *Croft v. Pitman* (a), where the Defendant, a coal-merchant, was holden to be within the act, because he sold coals at an office in *London*, although he resided and had a wharf in *Southwark*. In *Gray v. Cook* (b), *Miller v. Williams* (c), and *Skinner v. Davis* (d), the Defendants did not occupy any shop, stall, or place of business constantly, but only occasionally.

An officer of the sheriff of *Middlesex*, who resided and carried on his business in *Middlesex*, but who had also an office in *London*,

Held, “to seek his livelihood in *London*,” within the meaning of the *London* court of conscience act.

Wilde Serjt. shewed cause, on affidavits which stated that the Defendant also carried on the business of a sheriff's officer in partnership with his son, at a lock-

(a) 5 *Taunt.* 649. 1 *Marsh.*
269.

(b) 8 *East*, 336.

(c) 5 *Esp.* 19.

(d) 2 *Taunt.* 196.

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up house for the sheriff of *Middlesex*, in *Newman Street*, *Oxford Street*, where he slept and resided, was rated as the occupier, and of which, jointly with his son, he paid the rates and taxes. It was also sworn that the sheriffs of *London* had no officer of the name of *Levi*.

Wilde distinguished *Croft v. Pitman*, on the ground that in that case the debt was contracted in *London*; here it was contracted in *Middlesex*; so that the Defendant being an officer of the sheriff of *Middlesex*, and not an officer of the sheriff of *London*, and having a place of business in *Middlesex*, must be esteemed to carry on his business in that county, although he might have an office in *London* also. But

The Court, adverting to the language of the act, which applies to "any person seeking his livelihood in *London*," thought that after the decision in *Croft v. Pitman*, the Defendant must be deemed to seek his livelihood there; and the rule was made

Absolute.

Feb. 4.

ARNOLD, Clerk, and Others, v. The Bishop of
BATH and WELLS, LEEVES, and DAVIES.

1. A bishop's register is evidence of the facts stated in it.

QUARE impedit. The first count of the declaration stated, that from time whereof the memory of man is not to the contrary, there had been and was a certain

2. An allegation of a custom in *parishioners* to elect a curate is not supported by proof of such a custom in *parishioners paying church rates*.

3. *Semble*, an ecclesiastical custom (which is not immemorial) will not, though acted on for a long time, deprive a rector of his common law right to appoint his curate.

chapel

chapel with the cure of souls, which, during all that time, when full, had been and of right ought to have been, and still of right ought to be, served by a curate thereof, that is to say, the chapel of *Burrington*, situate in the county of *Somerset*, and which, during all the time aforesaid, had been and still was annexed to the parish of *Wrington* in the same county; that from time whereof the memory of man was not to the contrary, there had been and now was, and still of right ought to be, *a certain ancient and laudable custom* used and approved of within the said chapel, that is to say, that when and so often as the said chapel had become and been, or should become and be vacant, and upon every such vacancy happening, it had been, and should and might be lawful *for the several persons being then respectively parishioners of the same chapel, or the majority of them in vestry assembled*, due notice having been publicly given in the said chapel during or immediately after the performance of divine service there, of the day and time appointed for holding and assembling such vestry, *to elect and nominate a clerk in holy orders to be curate of and for the said chapel of Burrington, and to present him to the person who for the time being should or might be rector of the said parish of Wrington, for his approbation*, in order that the said rector, if he found or finds the said clerk so elected and nominated a proper person to have and serve the said cure, might and should approve, and (after he should have taken an oath of obedience to him the said rector for the time being, and his successors,) admit the said clerk to the said cure, and present him to the bishop of the diocese within which the said chapel was situated, for him, if found by the said bishop to be a fit and proper person to have and serve the said cure, to be licensed by him the said bishop to serve the same; that, in pursuance of the said custom, theretofore, and on the said chapel becoming

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becoming and being void by the death of one *George Inman*, clerk, then formerly incumbent thereof, to wit, on the 9th day of *March*, in the year of our Lord 1795, to wit, at the chapel aforesaid, in the county aforesaid, certain persons then respectively being parishioners of, and being then and there the majority of the parishioners of the said chapel, and then and there in vestry duly assembled, pursuant to such notice as in that behalf aforesaid before that time, to wit, on, &c. at, &c. duly given, did then and there elect and nominate one *Sydenham Teast Wylde*, then and there being a clerk in holy orders, and a proper person to have and serve the said cure, to be curate of and for the said chapel, and did then and there present him to the Defendant, *William Leeves*, who then and there was and still is rector of the said parish of *Wrington*, according to the said custom, and that the Defendant, *William Leeves*, did then and there approve the said *Sydenham Teast Wylde*, and did, after the said *Sydenham Teast Wylde* had taken such oath in that behalf as aforesaid, then and there admit the said *Sydenham Teast Wylde* to the said chapel, and did then and there present and nominate the said *Sydenham Teast Wylde* to the then Bishop of *Bath and Wells*, (the said chapel being then and there within the diocese of the said bishop,) to be by him licensed to serve the said cure, and the said *Sydenham Teast Wylde* was afterwards, to wit, on, &c. at, &c. duly licensed by the said bishop to serve the same accordingly; that afterwards, to wit, on the 12th of *May*, in the year 1826, the said chapel of *Burrington* became void by the death of the said *Sydenham Teast Wylde*, and yet was void; and by virtue of the premises and of the said custom, it then and there belonged to the then parishioners of the said chapel so in vestry assembled, such notice having been given in that behalf as aforesaid, or the majority of them,

them, to elect and nominate a clerk in holy orders, being a proper person to have and serve the said cure as curate of the said chapel; that afterwards, to wit, on the 14th *June*, in the year 1826, to wit, at the chapel aforesaid, in the county aforesaid, the Plaintiffs, being then and there a majority of the parishioners of the said chapel, duly assembled in vestry (due notice having been previously, to wit, on the day and year last aforesaid, at the chapel aforesaid, publicly given in the said chapel during or immediately after divine service thereof, of the day and time appointed for holding and assembling such vestry), to elect and appoint a clerk in holy orders curate of the said chapel; whereupon the Plaintiffs being and constituting the majority of the then parishioners of the said chapel so assembled in vestry as aforesaid, then and there elected and nominated *James William Arnold* to be curate of the said chapel, he the said *James William Arnold* being then and there a clerk in holy orders, and then and there a fit and proper person to have and serve the said cure; whereupon and by virtue of such election and nomination at such vestry so assembled as aforesaid, it belonged to the Plaintiffs to present the said *James William Arnold* to the Defendant *William Leeves*, so being such rector as aforesaid, for the approbation of him the said Defendant *William Leeves*, as a fit and proper person to have and serve the said cure, so that he should and might, after he should have taken such oath as aforesaid, be by the said Defendant *William Leeves* admitted to the said cure, and presented to the said bishop of the said diocese, in order that he the said *James William Arnold*, if he should be found by the said bishop to be a fit and proper person to have and serve the said cure, might be licensed by the said bishop to serve the same; but the Defendants unjustly hindered them the Plaintiffs.

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The second count alleged a right in the parishioners of the chapel to elect and nominate a curate under a lost act of parliament of 11 *Hen.* 7.

The Defendants *Leeves* and *Davies* pleaded to the first count, that the chapel was part and parcel of the rectory of *Wrington*; that it belonged to the rector to appoint the curate; that *Leeves*, in right of his rectory, appointed *S. T. Wylde* in 1795, and that on the 12th of *May* 1826, *Leeves*, in the same right, appointed the Defendant *Davies*, and presented him to the bishop; and concluded by traversing the custom set out by the Plaintiffs.

In the plea to the second count, they set up the same title, and traversed the act of parliament.

In a third plea to both counts, they traversed the election by the Plaintiffs.

The bishop disclaimed any thing in the chapel, except to license the ministers.

Issue was joined on the above traverses.

At the trial before *Littledale J.*, *Somersetshire* Summer assizes, 1828, the Plaintiffs produced, in support of their claim, the following documentary evidence:

1st. An entry in a book found in the registry of the Bishop of *Bath* and *Wells*, entitled,

“*Registrum instrumentorum clericorum exhibit. in visitacōe trienniali Epāli Bathon. et Wellen. in anno 1606.*”

“*BURRINGTON.*”

“*Johannes Tristram* clīcūs ordinat. presbiter per Dūm *Willūm Cestren.* Epūm 8 *Aprilis* 1576, admiss. ad curā animar. in ecclīā ib^m. per Dūm *Ricardum Forster*, clīcū nup. rectorem de *Wrington juxtā consuetud. &c.* 27 *Septembris* 1591. Licentiat. ad concionand. per Dūm *Thomā* nup. *Bathon. et Wellen.* Epūm 7 *Januar.* 1588.”

2dly. The following extract from the parliamentary survey of 1649:—

“*Parish*

“ Parish of *Berrington*. There is in it a church or chapel, being, as we conceive, a donative, worth, *per annum*, about three and forty pounds.

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“ The minister there *hath usually been elected by the parishioners of Berrington, and approved of by the rector of Wrington*. The tithes of corn, hay, wood, and teazles, payable out of the parish of *Berrington* to the parish of *Wrington*, are worth, *per annum*, 22*l*.”

3dly. The instrument of the rector’s approval and admission of Mr. *Inman*, bearing date 12th July 1744, and preserved in the bishop’s registry. By this instrument, *Henry Waterland*, the then rector of *Wrington* (after reciting the election and nomination of *Inman* by the *parishioners of Burrington*, their presentation of him to the rector for his approbation, and for the purpose of admitting him, according to the tenor of a certain statute relating to the said chapel), approved of, admitted, and presented *Inman* to be licensed to the said chapel.

4thly. The instrument of the Defendant’s, *Leaves*, approval and admission of *Wylde*, expressed in the same form as the instrument by which Dr. *Waterland* had approved of and admitted *Inman*.

The Plaintiffs then proved, that, a day or two before the election of *Arnold*, a church rate was made, and that it was agreed at the election to go by that rate; that every one who was at the election, and whose name was on the rate, voted; the proxy of an absent person was refused, because his principal’s name was not on the rate; and the vote of one present, who was not on the rate, was admitted.

The Defendants relied mainly on the following extract from the ecclesiastical survey of 26 H. 8.:

“ *Wrington, with the chapel of Berrington annexed*. The rectory there is worth by the year, in demesne lands, 40*s*. Prædial tithes, 28*l*. Tithe of wool and

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lambs, 7s. Oblations, with personal tithes, 14*l.* 14*s.* 8*d.* In pence paid to the archdeacon of *Wells*, as of synodals, 7*s.* 6*d.* To the bishop, as of procurations, 16*d.* To the abbot of *Glastonbury*, as a pension, 40*s.* And to a certain priest, celebrating in the said chapel annexed, for his stipend annually, by composition, 66*s.* 8*d.*:"

On an entry in the parish book of *Burrington* as follows :

" *April* 30. 1744. At a general meeting of the *inhabitants* of the parish of *Burrington*, notice being given on the *Sunday* before in the parish church, the Rev. Mr. *George Inman* was unanimously *elected* chaplain of the said church of *Burrington*, vacant by the death of Mr. *Wilks*, by us, whose names are hereunto subscribed, having a right to elect *upon the account of paying four pounds to the said chaplain over and above his tithes* :"

On another entry in the parish books of *Burrington*, of the election of Mr. *Wylde* to the cure on the 9th of *March*, 1795, in the same form as the entries touching the election of *Inman* :

And they objected to the admission in evidence of the Plaintiff's first document, the register of visitations in 1606.

The document, however, was received, and a verdict was found for the Plaintiffs, in which the jury also disposed of some objections made on the part of the Defendants to the sufficiency of the notice of the disputed election, and of the rate on which that election appeared to have proceeded.

Merewether Serjt. moved for a new trial, chiefly on the ground that the register of visitations of 1606 had been improperly received in evidence, as containing, not the original admission of the person named in it, but merely a statement made, it did not appear by whom, of transactions anterior to the date of the register ;

And that the qualified custom, proved at the trial for
 such

such persons to vote as contributed to the church rate did not sustain the absolute right in all the parishioners, as alleged in the declaration.

He also moved in arrest of judgment that the Plaintiffs ought to have shewn a seisin, either in themselves, or in those under whom they claimed; but that being unincorporated, and a mere fluctuating body, they were incapable of having such a seisin. *R. v. Marquis of Stafford*. (a) *Russell v. Men of Devon*. (b) *Farnworth v. Bishop of Chester*. (c) *Com. Dig., Pleader, 3. l. 4.*

But the judgment of the Court was confined to the other points.

Wilde and *E. Larwes*, Serjts. shewed cause. The bishop's register was properly received in evidence. Registers, when brought from the proper custody, are evidence of the facts stated in them, and it has never been decided that further proof should be adduced of such facts. *Bullen v. Michel* (d), *Bishop of Meath v. Belfield* (e).

As to the alleged variance in the proof of the custom, the best evidence of that custom is the parliamentary survey of 1649, in which document no mention is made of any qualification. The limitation of the right to those who paid rates is not mentioned previously to the year 1744, and it was probably then resorted to as affording the readiest means of ascertaining who were parishioners, and not with any view to narrow the suffrage.

Merewether. If the entry in the register had been the entry of an exhibit at the bishop's visitation, there

(a) 3 *T. R.* 646.

(b) 2 *T. R.* 667.

(c) 4 *B. & C.* 555.

(d) 2 *Price*, 399.

(e) 1 *Wils.* 215.

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would have been no objection to receiving it in evidence ; but it is the entry of a parol declaration as to a particular fact, of which the party making the declaration could have no knowledge but by general reputation ; and general reputation is not admissible evidence of a particular fact. *Rex v. Eriswell.* (a) As to the custom, there is no evidence of any common law custom, at least of sufficient validity to deprive the rector of his common law right to present ; for in *Gape v. Handley* (b), Lord Mansfield said, “ The restriction of the presentation to the select body is the most reasonable restriction that can exist : a popular election of a minister raises fumes and heats among the parishioners, and tends much to destroy Christian charity.” The ecclesiastical survey makes no mention of the custom. The expression *juxta consuetudinem* in the bishop’s register may apply to a mere ecclesiastical custom, which may exist after forty years, and need not be, like a common law custom, from time immemorial. And the parliamentary survey confirms this view of the case, by employing the word *usually* instead of *immemorially*. The usage, too, which has prevailed at the elections, of which evidence has been given, is indicatory rather of an ecclesiastical than a common law custom. The 4*l.* payment, in respect of which the parishioners appear to have voted, is probably the same charge which was paid by the rector at the time of the ecclesiastical survey, and the nomination of their curate was probably conceded to them in consideration of their relieving the rector of that charge.

BEST C. J. The bishop’s register was properly received in evidence ; but as sufficient attention has not been paid to the question whether this was an ecclesias-

(a) 3 *T. R.* 707.(b) 3 *T. R.* 291. n.

tical or a common law custom, and as the attention of the jury ought to have been directed to that point, the cause must be tried again.

The register is evidence of the business transacted at the bishop's visitation : he there enquires how parishes are served, and how clergymen have been appointed ; and those enquiries would lead him to ascertain whether a clergyman had been appointed under a custom or not ; but the answers furnished to him would not shew whether the custom were a common law or an ecclesiastical custom. In the present instance we must endeavour to ascertain that point from the usage. But the elections of 1744 and 1795 afford strong indications that this was not a common law custom, and are, besides, altogether at variance with the custom alleged in the declaration. When it appears that within 100 years the curacy was worth only from 40*l.* to 50*l.* a year, and that a portion even of that amount is made up of tithes, can it be supposed that the inhabitants have paid 4*l.* a year immemorially ? It is observable, too, that no evidence has been given on the subject of the payment by the rector, mentioned in the ecclesiastical survey. The right of nominating the curate is by common law in the rector, and we should require a custom of the nature relied on in this action to be very clearly proved. Nothing is so likely to engender feuds in the parish, and bad feeling between the rector and his parishioners, as the depriving the rector of that right which he is best qualified to exercise. Inasmuch, therefore, as the evidence of this custom is not clear and satisfactory, the rule for a new trial must be made absolute.

PARK J. It is desirable that the rector should have the nomination of all the clergymen under his control ; he is the best judge of their principles and attainments,
and

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and the best able to take precautions against the holding forth one doctrine in the morning and another in the evening. But there ought to be more investigation as to the nature of the custom on which the Plaintiffs sue ; and, therefore, the rule for a new trial must be made absolute. I incline to think the bishop's register was properly received in evidence ; the strict enquiries made at visitations render it a very authentic repository of facts, as those who have attended at such meetings will readily perceive.

BURROUGH J. I think that there ought to be a new trial in this case, for the reasons which have been stated. But I am further of opinion that the bishop's register ought not to have been received in evidence, at least, as evidence of the custom. The words *juxta consuetudinem* are ambiguous, and unless the entry shewed a clear immemorial custom, it ought not to have been admitted.

GASELEE J. concurring in the propriety of a new trial, the rule was made

Absolute.

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DOE dem. DAVIES and CHEESE v. CREED.

THE lessors of the Plaintiff in these two ejectments, had obtained two several judgments in the same term against one *Chinn*; upon which judgments they sued out two writs of *elegit*, tested the same day and same term, and delivered them to the sheriff together, to be executed.

The inquisitions on both were taken, and dated 31st of May 1825.

The inquisition on the first *elegit*, after finding the property that *Chinn* was seised of at the time of the judgment, and the persons by whom it was occupied, and setting out a moiety, stated the delivery of such moiety to *Davies* in the usual way.

The inquisition on the second, after finding *Chinn* to be seised of the same property in the hands of the same occupiers, proceeded as follows: — “A moiety of all which said hereditaments and premises hath been this day extended by me, the said sheriff, in a certain other action against the said *E. Chinn*, at the suit of *J. Davies*.” It was then found that certain portions of the premises (there described) were a true and equal moiety of the said lands and tenements of *Chinn*; and the delivery of such moiety to *Davies* and *Cheese* was averred in the usual way.

The lessors of the Plaintiff thereupon commenced the above actions, to obtain possession of the premises.

The Defendant, who was not in occupation of any of the premises, but who claimed them under a conveyance from *Chinn*, was by rule of Court joined with the occupiers to defend as landlord; and by the terms of

1. Where two *elegits* are issued the same day upon judgments signed in the same term, the sheriff may extend on each an entire moiety of the Defendant's land, although the judgments are at the suit of different Plaintiffs, and the inquisition on the second *elegit* recites, that a moiety has been extended on the first.

2. Where a party defends an ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot object that the occupiers have not received notice to quit from the lessor of the Plaintiff.

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the rule, in case the occupiers should neglect to appear, the Defendant might appear by himself and defend his title to the premises, he consenting to enter into the like rule as the occupiers in case they had appeared; the Plaintiff to be at liberty in such case to sign judgment against the casual ejector, but execution thereon to be stayed till the Court should make further order; the Defendant to admit himself to be in the actual possession of the premises.

The occupiers did not defend, and judgment was signed against them; but they had been in occupation previously to the date of the judgments on which the *elegits* had issued.

At the trial of the causes before *Gaselee J.* last *Hereford* summer assizes, it was among other things objected on behalf of the Defendant in the first ejectment, that no proof had been offered of any notice to quit given to the occupier, and that without such notice the lessors of the Plaintiff could not recover. The Plaintiff was thereupon nonsuited.

Upon the second ejectment, evidence having been given of a disclaimer, the like objection could not be made; but it was urged that the inquisition on the second *elegit* was void, for delivering to the lessors of the Plaintiff the whole instead of the half of the second moiety of *Chinn's* property.

The learned Judge, however, overruled the objection; and it appearing that the alleged conveyance from *Chinn* to the Defendant was a gross fraud, a verdict was found for the Plaintiff on this second ejectment.

On the part of the Plaintiff,

Andrews Serjt. obtained a rule *nisi* to set aside the nonsuit, and have a new trial in the first cause; and on the part of the Defendant *Ludlow Serjt.* obtained a rule *nisi* to set aside the verdict for the Plaintiff, and enter instead a nonsuit in the second cause.

The

The two rules were argued together.

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Andrews Serjt. The Defendant could not in the first action take any advantage of the circumstance, that notice to quit had not been given to the occupiers of the premises in question. As they had suffered judgment by default, and he had been permitted to defend with a view to protect his own title, he was bound to rely on that alone, and could not take advantage of any thing that had passed between the lessor of the Plaintiff and the occupiers; for it might very well be that the lessor of the Plaintiff might have no interest in disputing the claim of the occupier, and might have brought the ejectment solely for the purpose of defeating a claim of the Defendant in a different right. It had, therefore, been decided in *Doe v. Williams* (a), that where a party defends as landlord, he cannot object that notice to quit has not been given to the tenants in possession. And the recent rule of Court in the King's Bench requires that in such a case the landlord shall admit himself to be in possession, and shall rely only on his own title. (b)

Then the two judgments being of the same term, and the *elegits* being both tested the same day, the execution of the second was regular, for there is no legal division of a day; the writ orders the sheriff to deliver to the Plaintiff a moiety of the lands of which the Defendant is seised on the day the writ comes to the sheriff's hand: so that, if two writs come the same day, the sheriff cannot do otherwise than give on each a moiety of the whole land possessed on that day. *The Attorney-General v. Andrew* (c) is an authority in point; and in *Huyt v. Cogan* (d), and *Burnham v. Pain* (e),

(a) *Cowp.* 621.

(b) 4 B. & A. 196.

(c) *Hardr.* 23.

(d) *Cro. Eliz.* 482.

(e) 2 *Brownl.* 97.

which

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which may be cited on the other side, it may be inferred that the writs were not delivered on the same day ; for *Comyns* (*Com. Dig. Exec. C 14.*), referring to those cases, lays it down, “if two have judgment, and one sues an *elegit* and has a moiety, and *afterwards* the other sues an *elegit*, the sheriff shall deliver but a moiety of the residue.”

Ludlow Serjt. contra. The Defendant was entitled to object that notice to quit had not been given to his tenants. The tenants were in before the judgment, and an outstanding term, in whomsoever vested, is a bar to an ejectment. Besides, the lessor of the Plaintiff, who claimed through *Chinn*, could not stand in a better situation than *Chinn* himself ; and as the occupiers were tenants from year to year, *Chinn* himself could not have ejected them without proving a notice to quit.

As to the *elegit*, it has been clear law from *Huyt v. Cogan* to the present day, that where a second *elegit* is executed against the lands of the same defendant, the sheriff can only take a moiety of what remains after the execution of the first. The only authority to the contrary is *Fitz. Abr. Exec. pl. 137.*, the credit of which is much shaken by a *quod mirum* interjected by the learned compiler. And though there seems to have been an exception in the case where the two judgments are of the same term, and in favour of the same party, (for the case in *Hardres* goes no further), that proceeds on the fiction that the term is but one day ; and so upon the second *elegit*, the sheriff gives a moiety of the lands of which the defendant was seised on that day. But where the inquisition on the second *elegit* recites the inquisition on the first, and so the sheriff admits himself to have received notice that one moiety is already gone, the fiction is excluded by the reality of the actual finding,

ing, and the sheriff can only give a moiety of that residue which the Defendant is found to be seised of; especially where, as in the present case, the two judgments are in favour of different Plaintiffs.

So, *Vin. Abr. Exec.* 594. is expressly in point: "If there be two judgments for 100*l.* each, and *elegit* on one, and inquisition finds he has twenty acres, and ten of them are extended, and then an *elegit* is sued upon the other, and inquisition finds he has *twenty* acres, and thereupon the other ten acres are extended, no *audita querela* lies; per Holt C. J.: at which Sir Bartholomew Shower, at the bar, shook his head; whereupon Holt said on his word it was true. If there be two judgments, and the Defendant is seised of twenty acres, and a moiety of them is extended upon one, and an extent goes upon the other, and inquisition thereupon finds him seised of twenty acres, *without any notice of the former extent*, and hereupon the other moiety is extended, this is well, though in truth a moiety of the remaining moiety ought to be extended."

BEST C. J. I am clearly of opinion, that there is no foundation for the objection which has been made to the execution of the second *elegit*. That writ was given by the statute of *West. 2. c. 18.*, the language of which is, *quod vicecomes fieri faciat de terris et catallis, vel quod liberet omnia catalla, exceptis bobus et afris caruæ, et medietatem terræ quousque debitum fuerit levatum per rationabile pretium et extentum*. Undoubtedly the sheriff is to take only a moiety: but the question is, to what time do the words of the statute relate? I am of opinion they relate to the time of issuing the writ. The sheriff must take on each writ a moiety of the lands that the Defendant has at the time of issuing that writ. Now at the time when these two writs issued, the Defendant had the whole of the lands in question, and the sheriff

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was, therefore, bound to take a moiety on each. This is the principle on which all the cases have proceeded. Upon a writ issued subsequently to a prior execution, the sheriff can only take the moiety of the moiety that remains; but if, at the time of issuing two writs, the Defendant is in possession of the whole of his land, the sheriff may take a moiety under each; and there is no difference in the case whether the two writs are at the suit of the same or of separate parties, provided they are tested at the same time, and have relation to the same day. Such was the case in the present instance; and, therefore, if the sheriff were to take under each writ a moiety of what the Defendant had at the time the writ issued, he would take one moiety under one writ, and the remaining moiety under the other. To this conclusion we must have come, even without the aid of a decision on the point. But the case of the *Attorney-General v. Andrew* is an express authority the same way, and is referred to by *Comyns* as such. This authority is consistent with the writ and the statute; it guides the way to which justice would incline, and is impeached by no conflicting decision. The rule, therefore, which has been obtained on the part of the Defendant must be discharged. We will take time to consider the other point respecting the notice to the tenants.

PARK J. and BURROUGH J. concurred.

GASELEE J. I have looked through all the cases, and find no distinction between *elegits* under several judgments at the suit of the same plaintiff, and *elegits* under judgments at the suit of several plaintiffs.

It is plain, from the case of the *Attorney-General v. Andrew*, that upon two *elegits* of the same term, at the suit of the same plaintiff, the whole of the Defendant's land may be taken; and there is no reason why the practice

tice should be different where the judgments are at the suit of several plaintiffs, provided they and the writs be of the same term. However, independently of any decision, it is clear, upon looking at the statute, that the sheriff may extend under each writ a moiety of what the Defendant was seised of on the day the writ issued. The rule for setting aside the verdict for the Plaintiff must, therefore, be

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Discharged.

On a subsequent day (*Feb. 7.*) *Best* C. J. said, that the rule for a new trial in the first cause must be made absolute.

Rule absolute accordingly.

TAYLOR and Others, Administratrixes of
 FOLDER, v. LYON.

Feb. 5.

THIS action, by *Ann Taylor* and *Mary Folder*, as administratrixes of *Sarah Folder*, deceased, was commenced 17th *September* 1827, upon the Defendant's acceptance of a bill of exchange. The letters of administration were dated 4th *December* 1827.

Declaration amended by allowing Plaintiff to declare, on the same cause of action, as surviving partners instead of administratrixes.

A bill was filed by Defendant in the Exchequer, and an injunction granted *Michaelmas* term 1827.

The injunction was dissolved, on the merits, at the close of *Trinity* term 1828.

The declaration was entitled 1st day of *Michaelmas* term 1827.

Pleas, general issue, statute of limitations, and that Plaintiffs were not administratrixes at the commencement of suit.

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Wilde Serjt. upon an affidavit that the Plaintiffs were the surviving partners, as well as administratrixes of *Sarah Folder*, and that at the commencement of the action their attorney had inadvertently supposed the letters of administration to have been then granted, moved to amend the writ and declaration, by changing the description of the Plaintiffs from “*administratrixes*” to “*surviving partners*,” in which character the action might be maintained; or to alter the title of the declaration from *Michaelmas* term 1827 to *Hilary* term 1828.

The statute of limitations would have been fatal to any new action.

He cited *The Executors of the Duke of Marlborough v. Widmore (a)*, where the Plaintiffs having declared as executors, on a promise to their testator, and issue having been joined on a plea of the statute of limitations, the Plaintiffs were allowed to amend by laying the promise as made to themselves.

Taddy and *Spankie* Serjts. shewed cause. In *The Executors of the Duke of Marlborough v. Widmore*, the Plaintiffs were only allowed to amend by laying the promise to themselves *as executors (b)*, and a count on such a promise might have been joined with a count on promises to their testator. But a count on promises to Plaintiffs as surviving partners cannot be joined with a count on promises to them in a representative capacity, or to the person whom they so represent. To allow the present amendment, therefore, will be in effect to allow the Plaintiffs to commence a new and a different action, and at the same time to deprive the Defendant of the advantage to which he would be entitled if that action had been commenced in the regular way. Besides, here there is nothing to amend by, which

(a) 2 *Str.* 890.

(b) 4 *Burr.* 2449. *Fitzgibb.* 193.

in *Green v. Rennet* (a), Buller J. says, is a circumstance by which the Court have always been guided.

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BEST C. J. Questions of amendment are questions for the discretion of the Court, which on such occasions is to be so exercised as to do justice between the parties. The Defendant does not allege that he has been prejudiced by the death of any witness, and I think the amendment ought to be permitted.

PARK J. Amendments are now generally allowed at every stage of the pleadings, for the advancement of justice. The question usually is, "Will any injustice be done by what is proposed?" and if not, the amendment is allowed. By allowing this amendment we shall prevent expense, and confer a favour on the Defendant, instead of a disadvantage; for if he succeeds, he will obtain his costs, which he could not have done as the declaration originally stood.

BURROUGH J. concurred; and on payment of costs the rule was made absolute as prayed, the Defendant having leave to plead *de novo*.

Rule absolute accordingly.

(a) 1 T. R. 782.

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Feb. 6.

WRIGHT v. WALES.

Defendant, as
fenreeve, hav-
ing the care
of certain
lands, over
which the
Plaintiff was
making a road,
asked him by
what authority
he acted; the
Plaintiff said,
by authority
of the magis-
trates, but did
not exhibit
any warrant,
whereupon the
Defendant ap-
prehended and
took him be-
fore a magis-
trate: Held,
that Defend-
ant was en-
titled to notice
of action under
7 & 8 G. 4.
c. 30., although
the Plaintiff
was not com-
mitting a ma-
licious injury.

TRESPASS and false imprisonment. At the trial before *Holroyd J.* last *Suffolk* assizes, it appeared that the Plaintiff being occupied with a number of teams in carting and spreading beach and shingle, for the purpose of making a road over certain town lands of the parish of *Walberswick*, the Defendant, who, as fenreeve of the parish, had the care of those lands, asked him by whose authority he was so employed. The Plaintiff answered, by authority of the magistrates; but as he did not exhibit any warrant or order, the Defendant, after warning him to desist, caused him to be taken into custody by a constable, and carried before a magistrate, who refused to receive the complaint, and discharged the Plaintiff; whereupon this action was commenced. It appeared that the Defendant thought he had a right to apprehend the Plaintiff, and was not actuated by malice. The jury, under the direction of the learned Judge, found a verdict for the Plaintiff, leave being reserved to the Defendant to move to enter a nonsuit instead, if the Court should be of opinion that the Plaintiff was doing a wilful and malicious injury within the meaning of 7 & 8 G. 4. c. 30. s. 24., or that the Defendant was entitled to notice of action under that statute.

Wilde Serjt. having obtained a rule *nisi* accordingly,

Storks and *Bompas Serjts.* shewed cause. It is perfectly clear that the Plaintiff was acting in the exercise of a supposed right, and therefore was not a person liable

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liable to be apprehended as doing a malicious injury. *Looker v. Halcomb.* (a) But unless he were doing a malicious injury, the Defendant could have no colour for apprehending him, and therefore was not entitled to the notice of action which the statute has required for persons doing any thing “in pursuance of that act,” (s. 41.) The apprehension of the Plaintiff was not under colour of that act, much less in pursuance of it, and the Defendant’s supposing he had authority to apprehend, does not vary the case. It is not distinguishable from *Cook v. Leonard.* (b) There, the Defendant, who, as constable of the town of *Stroud*, had, under a local act, authority to apprehend all vagrants within the limits of the town *during the hours of keeping watch*, attempted, during the *day*, to recover from a stable a dromedary which the Plaintiff had been exhibiting, and being resisted by the Plaintiff, assaulted and imprisoned him.

It was held, that as this was not done during the hours of watch, and the dromedary, not the Plaintiff, was the object of attack, the Defendant was not entitled to the notice of action provided for persons doing any thing in execution of or under the authority of that act, although persons exhibiting beasts in the streets were subject to a penalty under the same act. And *Bayley J.* said, “Where an act of parliament requires notice before action brought in respect of any thing done in pursuance or in execution of its provisions, those latter words are not confined to acts done strictly in pursuance of the act of parliament, but extend to all acts done *bonâ fide* which may reasonably be supposed to be done in pursuance of the act. But where there is no colour for supposing the act done is authorized, then notice of action is not necessary. And where an act of parliament says, that in case of an action

(a) 4 Bingham. 183.

(b) 6 B. & C. 351.

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brought against any person for any thing done in pursuance or in execution of the act, the Defendant shall be entitled to certain privileges, the meaning is, that the act done must be of that nature and description that the party doing it may reasonably suppose that the act of parliament gave him authority to do it. I think that, in this case, the Defendants had no reasonable grounds for thinking that the act of parliament gave to them, or to the commissioners, under whose authority they acted, any power to remove the dromedary from the place where it was at the time when they attempted to remove it, and that being so, I am of opinion, that the rule for a new trial must be made absolute."


Wilde replied, that the Defendant had, as *senreeve*, the care of the land which the Plaintiff was injuring; and the Plaintiff having declined to exhibit the authority under which he was committing the injury, the Defendant was bound to suppose he was acting maliciously: so that the apprehension was *boná fide* in pursuance of the act, although the magistrate afterwards did not find sufficient reason for the detention of the plaintiff. And *Gaby v. The Wilts and Berks Canal Company* (a) has decided, that a Defendant who acts *boná fide* under colour of a statute, may be entitled to notice of action where he has fallen into an error, although the party complaining against him may not be a wilful trespasser, or otherwise an offender against the statute. Such notices are required for the protection of those who err *boná fide*, and if not extended to them, would be useless, for persons acting legally do not want them.

PARK J. I am clearly of opinion, that the Defendant in this case was entitled to notice of action. If he had

(a) 3 M. & S. 580.

been

been acting legally, he would not have wanted the protection afforded by the notice. But if he made a mistake when he had reason to suppose he was acting in pursuance of the statute, he was entitled to the protection given. *Gaby v. The Wilts and Berks Canal Company* is in point.

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BURROUGH J. There can be doubt the Defendant has acted illegally; but it is equally manifest he had reason to suppose he was acting under the statute, and, therefore, he is entitled to the notice required.

In *Holton v. Boldero*, in the time of Lord *Mansfield*, the defendant, a magistrate, having ordered his groom to saddle a horse, the groom said, "I'll be damn'd if I do," whereupon the defendant committed him. The groom having sued him for false imprisonment, was nonsuited, because his action was laid in the wrong county, it being holden, that the defendant, having supposed he had a right to commit, was entitled to be sued as a magistrate, although he had acted without jurisdiction.

GASELEE J. In *Cook v. Leonard*, the Court said the Defendants had no colour for supposing they had authority for what they did; here I cannot say that the Defendant had no colour for supposing he ought to apprehend the Plaintiff, and, therefore, this rule must be made

Absolute.

BEST C. J. was at chambers.

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ALCOCK v. COOKE and Another.

Although the Duchy of Lancaster is held by the king separately from his crown, a grant of duchy property is subject to the same incidents as a grant from the crown.

Therefore, an immediate grant to *A.* in fee, under the duchy seal, of property which was in the possession of *B.* under an unexpired lease from the duchy for years, (such lease not being recited in the grant) was held void, notwithstanding there had been a user under the grant from the date of it (1631) to 1760.

TROVER for a bowsprit. At the trial before *Best* C. J. *Lincoln* Summer assizes, the Plaintiff claimed the bowsprit under a right to take wreck in the parish of *Sutton*, in *Lincolnshire*, and adduced the following evidence in support of his title :

First, An extract from Domesday-book, by which it was proposed to shew that *Sutton* was part of the manor of *Grendham* or *Greetham*.

Secondly, A grant by *Charles* I. (6 Car. 1631.) under the Duchy of *Lancaster* seal, to *Charles Harbord*, *Christian Favell*, and *Thomas Young*, and their heirs (under whom the Plaintiff claimed), of (among other manors, lordships, castles, hundreds, &c.) the manor of *Greetham*, in the county of *Lincoln*, with all its rights, members, and appurtenances, the reeveship of *Greetham*, and the bailiwick of *Greetham*, and all lands, tenements, rents, and hereditaments whatsoever in *Greetham* and various other places (but not mentioning *Sutton*), or in any or either of them, or elsewhere in the said county of *Lincoln*, called or known by the name of the lordship or manor of *Greetham* aforesaid, to the said lordship or manor, reeveship or bailiwick of *Greetham* in anywise belonging or appertaining, or as member, part, or parcel of them or any of them being heretofore had, known, accepted, occupied, used, or reputed, with all their appurtenances, (which said lordship or manor of *Greetham*, and other the premises before granted, were, by a particular thereof, mentioned to be altogether parcel of the ancient lands and possessions of the duchy of *Lancaster*, in the county of *Lincoln*,) and all and singular granges, farms, &c.,
and

and all rents, revenues, and services, rents-charge, rents-scot, &c., yearly rents, increased rents, fee farms, &c., courts-leet, &c. and all that to courts-leet did in anywise belong, &c. immunities, acquittances, and hereditaments whatsoever, with all and singular their rights, members, and appurtenances, of what kind or nature soever they be, or by what name soever they are known, deemed, called, or acknowledged, situate, lying, and being, issuing, growing, renewing, happening, or arising in or within the lordships, manors, hundreds, towns, places, fields, parishes, or hamlets aforesaid, or in or within any or either of them, or elsewhere, or wheresoever to the aforesaid castles, lordships, manors, hundreds, messuages, lands, tenements, and hereditaments, and other the premises by those presents before granted or mentioned so to be, to any or either of them, or to any part or parcel thereof in anywise belonging, appertaining, incident, appendant, or incumbent, or as member, part, or parcel of the same, being at any time theretofore had, known, accepted, occupied, and demised, leased, or reputed, and the reversion, &c. dependent or expectant of, in, or upon any gift or gifts in fee-tail, or any demise or grants for the term or terms of life, or lives, or years, and also all rents reserved upon any demise or grant, demises or grants :

And by the same letters patent the said king did also grant unto the said *Charles Harbord, Christian Favell, and Thomas Young*, their heirs and assigns, that they, their heirs and assigns, should from thenceforth for ever have, hold, and enjoy within the aforesaid castles, lordships, manors, hundreds, lands, tenements, and hereditaments, and all and singular other the premises thereby granted, as many, as great, such, the same, and the like courts-leet, views of frankpledge, hundred courts, law days, assize and assay of bread, wine, and beer, goods and chattels waived,

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waived, estrays, deodands, escheats, reliefs, heriots, free-warrens, hawkings, huntings, *and all other rights, jurisdictions, and franchises, liberties, privileges, customs, immunities, acquittances, profits, commodities, advantages, emoluments, and hereditaments whatsoever, as and which, and as fully, freely, and wholly, and in as ample manner and form as any abbot or prior of any late monastery, abbey, or priory, or any Duke of Lancaster, or any other person or persons at any time having, possessing, or being seised of the aforesaid castles, lordships, manors, messuages, lands, tenements, and hereditaments, and other premises thereinbefore granted or mentioned so to be, or any parcel thereof, ever had, held, used, or enjoyed, or ought to have had, held, used, or enjoyed in the premises thereinbefore granted by reason or pretext of any act or acts of parliament, or of any charter of gift, grant, or confirmation, or by reason of any letters patent by the said king or any of his progenitors or ancestors then late kings or queens of England theretofore had, made, granted, or confirmed, or by reason or pretext of any lawful prescription, use, or custom theretofore had or used, or by any other lawful means, right, or title whatsoever; and as fully, freely, and wholly, and in as ample manner and form as the said king, or any of his progenitors or ancestors, then late kings or queens of England, had had or enjoyed, or ought to have had or enjoyed in the premises thereinbefore granted or mentioned so to be, or in any part or parcel thereof, or by reason or pretext of the premises or of any parcel thereof: except always nevertheless, and out of that grant altogether reserved all knight's fees, wards, wards and marriages of the premises, and all services for or in respect thereof, and all advowsons, donations, free dispositions, and right of patronage of all and singular rectories, churches, vicarages, chapels, and all other ecclesiastical benefices whatsoever to the premises, or*
any

any or either of them in anywise belonging, appertaining, incident, appendant, or incumbent, and also except all royal mines of gold and silver, being or to be found within or upon the premises, and all prerogatives to the same mines belonging.

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Thirdly, In order to shew that the reversion of the right to wreck was vested in King *Charles* at the date of the preceding grant, the Plaintiff gave in evidence a lease from King *James* the First to one *Livingstone*, of (*inter alia*) all wrecks of the sea within the honour of *Bolingbroke*, which, by other evidence, was shewn to comprise the manor of *Greetham*.

The following is an abstract of the lease: —

“ Indentures of lease (5th *Jan.*, 12 *Jac.* 1.) between King *James* I. of the one part, and *John Livingstone* Esq. of the other part, whereby the said king granted, and to farm let to the said *John Livingstone* (*inter alia*) all and singular the profits and commodities happening within the honour of *Bolingbroke*, parcel of the duchy of *Lancaster*, in the county of *Lincoln*, of the goods and chattels, and debts and credits whatsoever of felons, felons of themselves, and fugitives, clerks convicted, persons outlawed, deodands, waifs, estrays, and wrecks of the sea, as well in the accounts of the bailiffs and ministers of the said honour of *Bolingbroke* aforesaid, accountable, as otherwise, within the said honour, to the said lord the king, answered or to be answered: To hold the same unto the said *John Livingstone* from *Michaelmas* then last, for the term of thirty-one years, at the yearly rent of 6*l.*, and a moiety of all profits, amounting in themselves to 50*l.* and upwards.”

Fourthly, The Plaintiff gave in evidence certain proceedings in a suit in the Duchy Court of *Lancaster*, in the 8 *Charles* 1., relative to the right of wreck within *Sutton* among other places, wherein the attorney-general

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neral of the duchy, on the relation of *Charles Harbord*, the surveyor-general of the duchy (and one of the grantees under the letters patent from King *Charles*) was Plaintiff, and one *Rogers* was Defendant. In the information the lease of 12 *Jac.* 1. to *Livingstone* was recited; and in the information and decree *Sutton* was mentioned as within the manor of *Grendham*, alias *Greet-ham*, and *Greetham* within the honour of *Bolingbroke*; but the Defendant did not justify for *Sutton*.

Fifthly, Testimony was given of the undisputed exercise of the right by those under whom the Plaintiff claimed till about 1760; after which it appeared the Defendant *Cooke*, and those from whom he inherited, had claimed the wreck over the district in question, and had frequently taken it.

On the part of the Defendant, it was objected that wreck was a royal prerogative, and, therefore, would not pass by general words, — the only words supposed to convey it in the grant of 6 *Car.* 1.

That even if it could pass by such words, *Sutton* not being mentioned in that grant, no intention appeared to convey wreck in *Sutton*; and,

Lastly, That in point of fact *Sutton* was not within the manor of *Greetham*.

A verdict was taken for the Plaintiff, subject to the decision of the question on the grant which was reserved for the consideration of the Court; as also, whether if the grant were void the evidence of user were sufficient to establish a right by prescription.

Adams Serjt. moved accordingly for a rule *nisi* to set aside the verdict and enter a nonsuit, or have a new trial, on the grounds above stated.

To shew that wreck is a royal prerogative, he referred to 17 *Edw.* 2. c. 11.; and that a prerogative in the hands
of.

of a subject becomes a franchise; *Com. Dig. Franchise*; that a prerogative right will not pass by general words; *Com. Dig. Grant* (G 6, 7.), and *Heddy v. Wheelhouse* (a); which case was recognized as law by the case of *The Abbot of Strata Mercella*. (b)

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With respect to the fact, whether or not *Sutton* was parcel of *Greetham*, it was contended that the meaning of the passage in Domesday had been mistaken.

A rule *nisi* having been granted,

Wilde Serjt. shewed cause. The authorities which have been cited on the subject of the grant of a prerogative right by the crown are not disputed. But the grant on which the Plaintiff relies is not a grant from the crown. It is a grant from the Duke of *Lancaster*; and by 1 *Edw.* 4. it is enacted, that the Duchy of *Lancaster* shall be held by the king separate, and perpetually, as an inheritance distinct from the crown, as largely as ever it had been held by the Duke of *Lancaster*. This was enacted to secure the king in those unsettled times an honourable retreat in case of his being deprived of the crown. (4 *Inst.* c. 36. p. 205.) Grants of duchy lands are made not under the great seal, but under the duchy seal, and are subject to the same incidents as a grant by a private person.

Then, although *Sutton* is not mentioned in the grant, it is clear from the decree in the Exchequer, that it is part of the manor of *Greetham*; and the intention to pass all that belonged to the duchy in that manor is abundantly manifest. That the right to wreck was in the duke, at least in reversion, appears from the lease of it to *Livingstone*. The general words in the grant are as comprehensive as it is possible to employ; and the exceptions expressly made, as of gold and silver mines,

(a) *Gro. Eliz.* 591.

(b) 9 *Rep.* 24.

&c.

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&c. lead to a strong inference that every thing was meant to pass except what was specifically excepted.

The sufficiency of the user to establish a right by prescription was not relied on: but it was contended there was evidence sufficient to shew *Sutton* to be parcel of *Greetham*.

Adams in support of his rule.

Although the duchy of *Lancaster* is holden separately from the crown, a grant of duchy property is subject to all the incidents of a grant of crown property. *Regina v. Archbishop of York* (a), *Plowden*, 217. 4 *Inst.* 209. And not only is it clear that in a grant by the crown wreck will not pass under general words, but it is equally clear that an immediate grant by the crown in fee or tail of property in the possession of a person other than the grantee, under an unexpired lease from the crown, not recited in the grant, is void. Case of *Alton Woods* (b), *Earl of Rutland's case* (c), *Com. Dig. Grant*, 9, 10. *Roll. Abr. Prerogative*, 9.

Here, even if *Sutton* were within the grant of 6 *Car.* and wreck would pass under the general words of that grant, yet the grant was void: for it is a grant to *Harbord* and others in fee, with immediate possession, although the right to wreck was in the possession of *Livingstone*, under an unexpired term of years, which is not recited in the grant.

Upon examining the extract from *Domesday*, the Court were of opinion that *Sutton* was not within the manor of *Greetham*; but judgment was given on another point.

Cur. adv. vult.

(a) *Cro. Eliz.* 241.

(b) 1 *Rep.* 26.

(c) 8 *Rep.* 57 a.

BEST

BEST C. J. The points which were reserved at the trial were, first, whether, under the deed of 6 *Car.* 1. (supposing *Sutton* to be within the manor of *Greetham*), wreck is conveyed to the person to whom that grant was made, and through that person to the Plaintiff; and, secondly, supposing wreck not to be conveyed, whether the parol evidence is sufficient to support a prescriptive claim.

I will shortly dispose of the second question. The parol evidence cannot support a prescriptive right to wreck, because it appears clearly from the information in the Duchy Court, that all this property was in the crown as late as in the reign of *Charles* I. If it was in the crown as late as the time of *Charles* I., the Plaintiff could not have evidence from whence a jury might infer that it was in those whose estates the Plaintiff holds, from time of memory. It seems to me, therefore, to be impossible (strong as the evidence may be) that the Plaintiff can make out, in this case, a title to wreck by prescription.

That brings me to the other question, whether or not the deed of the 6 *Car.* 1. conveys wreck. Now, two points have been made on that deed; first, that wreck will not pass under general words; and, secondly, that the grant is void, as granting in possession that of which the crown had only the reversion. There can be no doubt that *Sutton* was a place the wreck in which was leased by indenture in the 13 *Jac.* 1. to *Livingstone*; that indenture is a lease from the king; and it is material to attend to this circumstance, that every lease from the king must be enrolled. This has on its title, "from the 9th to 13th *James* I., folio 140." It is made between King *James* of the one part, and *John Livingstone*, Esq. one of the grooms of the chamber of the king, of the other part. It grants wreck, and also all and singular the profits and commodities

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dities happening and arising within the whole honor of *Bolingbroke*, (it is taken that *Greetham* is a part of the honor of *Bolingbroke*,) parcel of the duchy of *Lancaster*, in the county of *Lincoln*, to *Livingstone*, for thirty-one years. In the decree in the Duchy Court of *Lancaster*, this lease to *Livingstone* is recited as an existing lease. Now, at the time the decree in the Duchy Court of *Lancaster* was pronounced, the grant of the 6 *Car.* 1. had been executed: the lease, therefore, was an existing lease at the time of the 6 *Car.* 1. This brings us to the question, whether, as the king had granted a lease of this property, and had not recited that lease in the grant of the fee in perpetuity, the latter grant was not, by the common law of *England*, altogether void? We are of opinion, that it was altogether void. We take it to be a principle of the common law of this country, that if the king makes a grant which cannot take effect in the manner in which it ought to take effect according to its terms, we must conclude that the king has been deceived in that grant, and, therefore, that the grant is void. The grant, indeed, does not contain the word *Sutton*; but I am taking it now, that *Sutton* is a part of *Greetham*, and the conveyance applies to *Greetham* in all its parts. If *Sutton* be not part of *Greetham*, the Plaintiff is a perfect stranger, and cannot have the least pretence to maintain this action. Assuming, however, that *Sutton* is within *Greetham*, in our opinion, it is not well conveyed; because, having been before granted by lease, and that lease not being recited, the king has proposed a grant which he cannot carry into effect. Having already leased the right of possession, he proposes, by this grant, to convey the same right of possession to another person. Now, it would be inconsistent with the king's honor, (and, as it is stated in a case to which I shall presently refer, the common law has no object that is dearer to it than to preserve that honor), it would be inconsistent

inconsistent with the king's honor that he should grant the right of possession in the same thing to two. And, therefore, the latter grant is altogether void. If the king is deceived in his grant, it is perfectly clear the grant is void. It cannot be supposed, unless he is deceived in his grant, that he would grant to *A.* that which he has already granted to *B.*: that would be giving occasion to litigation, which it is always the object of the king to prevent. I must, however, guard the observation I am now making. The attention of the Court has been called to the circumstance of this being a lease from the king, which must be enrolled; and the doctrine which I am now laying down is applicable only to grants so enrolled: because, if an individual grants a lease, and the estate of which that individual grants a lease afterwards comes to the king, if the king regrants that, as the subject could not know with certainty that there was a previously existing lease, the position I have been laying down would not apply. The doctrine that I am delivering is applicable to a case where the subject cannot be deceived, and he must be deceiving the king; for if the king's prior lease be enrolled, the subject has the means of knowing the existence of that lease, and it is his duty to inform the king of its existence. This lease, granted by *James I.* was a lease enrolled, and the persons under whom the Plaintiff claims, when they accepted the grant of the 6 *Car. 1.* had the means of knowing of the existence of the lease. In the case of the Earl of *Rutland*, it was decided that where one is an officer for life, if the king, without reciting that such a one was an officer for life, grants the office to another for life, the second grant is void for want of such recital; but no book says that if the king recites the first grant, and also recites that the officer is alive, this last grant shall be void for want of certainty. It will be seen that the present case turns on precisely the same principle.

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If the king grants an office for life, and grants the same office to another, it might be argued that the two estates might co-exist, because the second grant might give an interest after the first life is determined. But still, it is void altogether. Why? Because it professes to give an immediate interest, and that immediate interest the king cannot give, because the office is full, and there is a possibility that the king has been deceived. But if there had been a recital of the former grant, and also a statement of the fact that the former grantee was still alive, it is then clear that the king could not have been deceived, and the grant will have the effect of giving to the person in whose favor it is made, the estate, the office, after the life of the first grantee. Apply that principle to the present case: if the king had recited this lease, although he had granted the fee-simple during the existence of that lease, it would have been clear from the recital that he knew of the lease; but he does not recite the lease, and therefore it must be taken, when he makes another grant which cannot be immediately carried into effect, although according to its terms it is immediately to be carried into effect, that the king is deceived, and that therefore the second grant is void. The next case, that of *Alton Woods*, is entitled to the greatest consideration, because it came on, on a writ of error, before eight Judges, that is, all the Judges of *England* except the Barons of the Exchequer. The opinion of the Judges has also the confirmation of my Lord Chancellor *Egerton*, afterwards my Lord *Ellsmere*. The Judges in that case say, When the king makes a lease for life or years, and afterwards, without reciting this lease, grants the land in fee or in tail, although the king is stated to make this grant *ex certâ scientia et mero motu*, the said grant, without recital, is void by reason of the common law, because the king is deceived in his grant when he intends to grant that in possession which cannot

cannot take immediate effect, which the king doth propose and intend. Afterwards Lord Keeper *Egerton* says, the opinions of the Judges are perfectly satisfactory to me. My Lord Treasurer expressed the same opinion; and the Lord Keeper says, the king ought to be informed of his own estate, whether it be in possession or reversion. So that my Lord Keeper distinctly states the principle on which we are now putting this case: "You, the subject, who knew of the lease, ought to inform the king of the lease, and then you will see whether he will make a grant which he cannot completely carry into effect during the existence of that lease." In *Com. Dig. tit. Grant, (G.) 10.*, and in *Roll. Abr. tit. Prerogative of the King, 9.*, a great number of cases, which it would be a waste of time to state to the Court, are collected, in which the distinction is taken which I have before mentioned, that if a lease from the king be enrolled, a subsequent grant of the same estate, not reciting the lease, is void. So that the doctrine of these two cases, which has been confirmed by several others, has become the settled law of the land, and has been adopted into the most respectable text books.

But it has been argued that these lands belonged to the Duke of *Lancaster*, and that the statute of *Henry IV.* separates the lands of the Duke of *Lancaster* from the lands of the king. That is perfectly true; but although the lands are separate, by whom are they held? Are they held by a mere Duke of *Lancaster*? Or, when the king, as Duke of *Lancaster*, is the identical person, are they held by the king? Does the king descend from his high estate, to hold lands in any part of the kingdom upon different terms from those on which he holds all his estates? It would be inconsistent with the dignity of the king that he should do so; and therefore it has been decided, that, although he holds lands as Duke of *Lancaster*, he holds them as king also; and

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that all the prerogative and privileges of the king belong to him with reference to those lands, the same as they do with reference to lands which belong to him immediately in right of his crown.

In the case of *The Queen v. The Archbishop of York*, the question was, Whether a double and treble usurpation of an advowson put Queen *Elizabeth* out of possession of an advowson which she had in the right of the duchy of *Lancaster*? and it was adjudged that it did not. What is the reason given for it? — “for she had her privilege in this as if it had been in her in right of the crown.” Here is an express opinion of the whole Court that the king or queen has the same privilege with respect to the duchy lands that they have with respect to lands which belong to the crown.

In *Plowden's Commentaries*, 217. which is called the great case of the duchy of *Lancaster*, in which a question was referred to all the Judges to give their opinion with respect to certain leases that had been granted by King *Edward VI.* during his minority, the Judges used these words, “and so it seemed to them that the intent of *Henry IV.* and the charter and act of parliament were only to separate the lands, &c. of the duchy of *Lancaster* from the hereditaments of the crown, in order that they might remain in the person of the king so long as God granted that the crown and the duchy do continue together in the blood of the Duke of *Lancaster* and the mother of *Henry IV.*, and if the crown should be taken from the blood of the duke, that the duchy should remain his, and thus the charter and act are satisfied without derogation to the person of the king, or the destruction of the dignity or pre-eminence which the law attributes to the king.” Nothing can be more express than this; — he has separate estates: estate *A.* belonging to his crown estate, and *B.* belonging to his duchy of *Lancaster*. Although he holds *A.* as belonging

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ing to his dachy, he holds it also as king, and he has the same privileges and immunities as he has with respect to his other property; and so the Judges determined in that case. Although *Edward VI.* had granted a lease of the estate before he was twenty-one, that lease, which would have been bad in case he had been mere Duke of *Lancaster*, yet, as he was also king of *England* at the same time, was good. Lord *Coke* puts this very strongly in 4 *Inst.* 209. "All this appeareth by that great and grave resolution of the case of the duchy of *Lancaster*, reported by Mr. *Plowden*, that no statute now in force doth separate the duchy from the person of the king, nor to have the person of the king separate from the duchy, nor to make the king Duke of *Lancaster*, having regard to the possessions of the duchy, nor to alter the quality of the person of King *Henry VII.*, but only that the king should have to him and his heirs the said duchy separate from his other possessions. In which case the duchy at least was joined to the person of *Henry VII.* and to his heirs, and the person of the king remains as it did before; — for nothing is said to the quality of the person of the king, nor to the alteration of his name, and the person of the king shall not be enfeebled, because the duchy is given to the king and his heirs, but remains always of full age as well as to gifts as grants by him made as to administration of justice; whereupon it was resolved, that leases made by *Edward VI.* being within age, of lands, either within the county of *Lancaster*, or without, parcel of the duchy, (the royall and politick capacity of the king being not altered), were not voidable by his not being of age: a just resolution, as tending to the safety and quiet of purchasers and farmers, and proveth directly that the royal and politic capacity of the king being not altered (as to these possessions), the letters-patent of the king of these possessions under the duchy seal are of

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record: and we find no opinion in our books, or any thing in any record, that we remember, against this." This is abundantly satisfactory, and sufficient to shew that there is no distinction between the privileges of the king as Duke of *Lancaster*, and the prerogatives of the king as King of *England*. If it be so, then reverting to what I have already stated, that by the prerogative of the king, if the king is deceived in his grant, the grant is altogether void; and it appearing by decided cases, that it must be taken that the king is deceived in his grant when he grants that which he cannot give according to the terms of his grant; it appearing also, that at the time the grant of 6 *Car. 1.* was executed, the property granted was already in the possession of *Livingstone*, under a lease for years, and that that lease had several years to run; the grant of the 6 *Car. 1.* is altogether void; and for these reasons we are of opinion a nonsuit should be entered.

Rule absolute for entering a nonsuit.

Feb. 9.

DAVIS v. RUSSELL and Others.

1. Defendant,
a constable,
being told by
A. that Plain-
tiff had robbed

TRESPASS for assault and false imprisonment. Plea,
not guilty.

At the trial before *Gaselee J.* last *Gloucestershire* her, and the information being countenanced by a supposed intercepted letter which was shewn to him, apprehended Plaintiff, a respectable inhabitant of *Cheltenham*, at her lodgings, and took her from her bed at night to prison.

The charge proving unfounded, Plaintiff sued him for the false imprisonment; and the Judge having directed the jury to consider whether the foregoing circumstances afforded the Defendant reasonable ground to suppose the Plaintiff had committed a felony, and whether, in his situation, they would have acted as he had done, — Held, that this direction was substantially correct.

2. Held also, that, under the circumstances, the degree of coercion resorted to by the Defendant, was not excessive.

assizes,

assizes, the Plaintiff, an elderly female, proved, that on the 27th of *January* 1827, between ten and eleven at night, the Defendants, without producing any warrant, took her from her bed at her lodgings in *Cheltenham*, and conveyed her to prison, where she remained till the next morning, when she was carried before Mr. *Capper*, a magistrate, upon a charge of theft, which was ultimately dismissed.

The defence was, that, in the month of *November* preceding, a robbery had been committed in the house of *Ann Hamerton*, a young milliner at *Cheltenham*, with whom the Plaintiff at that time lodged; that upon that occasion the Plaintiff's trunk had been broken open, and that a 10*l.* note, and many other articles, had been taken out.

The Plaintiff shortly afterwards went to reside in the house from which the Defendants took her.

On the 27th of *January* following, Miss *Hamerton* showed the Defendant, *Russell*, the superintendant of the *Cheltenham* police, a letter addressed to the Plaintiff at Miss *Hamerton*'s house, and bearing the *Cheltenham* post-mark; and alleging, that upon looking in at the ends, she believed it to contain some allusion to the robbery, induced *Russell* to break it open.

The letter, which was anonymous, purported to come from an accomplice in the robbery, residing in *London*, and demanded money at the hands of the Plaintiff, as a joint perpetrator of the offence.

Miss *Hamerton* also told *Russell*, that four days after the robbery a letter had arrived for the Plaintiff in the same hand-writing, with the *London* post-mark, and that the Plaintiff had refused to show it; she then expressed her suspicions of the Plaintiff being concerned in the robbery, and said she thought *Russell* ought to take her into custody.

This, after reading the above letter, *Russell*, assisted by

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by the other Defendants, proceeded to do; the door of the house being opened to him when he knocked.

On cross-examination it appeared, that on the 8th of *January* preceding, the Plaintiff having found, secreted under Miss *Hamerton's* bed and on her person, sundry of the articles which had been stolen from the Plaintiff's trunk, took Miss *Hamerton* before Mr. *Capper*, the magistrate, charged her with the theft, and identified the articles found under her bed, as the articles which had been stolen from the Plaintiff's trunk. The Defendant was present upon that occasion. Mr. *Capper*, however, dismissed the charge. (a)

The learned Judge said, that if the constable had a complaint made to him under such circumstances as to induce him to believe it true, he had a right to take into custody the party complained against, provided the facts were such as to warrant an apprehension; and he desired the jury to consider whether the statement they had heard satisfied them, looking at the letter and the other facts, that the constable had reasonable ground to suppose the Plaintiff implicated in the felony with which she had been charged; and whether, standing in his place, they would have acted as he had done.

A verdict having been found for the Defendants,

Russell Serjt. moved for a new trial, on the ground, first, that the question, whether or not the constable had

(a) Miss *Hamerton* was, on the same evidence, tried and convicted for the robbery at the ensuing *Gloucester* Spring assizes; being then sentenced to seven years transportation, she committed suicide the next day. Upon that trial, the anonymous letter, on the credit of which *Russell* had apprehended the Plaintiff, was proved to have been written by *Hamerton*.

On the proof supposed to be afforded by that letter, the Plaintiff, when charged before Mr. *Capper* on the 28th of *January*, had been committed to prison for fifteen days, for further examination; at the expiration of that time, for five days more, and then dismissed.

reasonable

reasonable and probable cause for apprehending the Plaintiff, was a question of law which ought not to have been left to the jury; and, secondly, that the jury ought to have been directed to consider, whether, supposing the arrest justifiable, the circumstances of the case warranted the degree of coercion resorted to by the Defendants.

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First, the Defendant, as constable, could only excuse himself by giving in evidence, under the general issue, such circumstances as would have amounted to a justification if pleaded by a private person; *Mure v. Kaye* (a); and it is clear that on such a plea, if the facts were admitted by demurrer, the sufficiency of them to excuse the Defendant would be a question for the Court. *Hill v. Yates*. (b) Lord Coke says, (1 *Inst.* 52.) “If treason or felony be done, and one hath just cause of suspicion, this is a good cause and warrant in law for him to arrest any man; but he must shew in certainty the cause of his suspicion; and whether the suspicion be just or lawful, shall be determined by the justices in an action of false imprisonment brought by the party grieved, or upon a *habeas corpus*, &c.

In *Sutton v. Johnstone* (c), Eyre C. J. in delivering the opinion of the Court, says, “In our law, justification is a conclusion of law which necessarily results from a given state of facts.”

And in the argument for the Defendant in error, the doctrine was laid down and assented to as follows:

“What therefore is probable cause is the great matter for consideration. The definition of probable cause is, such conduct in an individual accused as will warrant a legal and reasonable suspicion of offence against the law in the mind of the person accusing, so as that a court can infer a prosecution to have been taken upon public motives. It is a mixed question of fact

(a) 4 *Taunt.* 35. (b) 8 *Taunt.* 182. (c) 1 *T. R.* 507.

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and law. What circumstances existed, and what knowledge the prosecutor had of them, is a question of fact: but when the facts are known, and the mind of the prosecutor is laid open to the jury by evidence, then whether it were a reasonable or an unreasonable cause of proceeding is a question of law."

In the reasons given by Lord *Mansfield* and Lord *Loughborough* in the same case, the law is stated to the same effect. "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable or not probable are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law: and upon this distinction proceeded the case of *Reynolds v. Kennedy*." (a)

This may be illustrated from the rule as to the reasonable notice of the dishonor of a promissory note or bill of exchange. "What is reasonable notice is partly a question of fact and partly a question of law. It may depend in some measure upon facts, such as the distance at which parties live from each other, the course of the post, &c. But wherever a rule can be laid down as to the reasonableness, that should be decided by the *Court*, and adhered to by every one for the sake of certainty." (By Lord *Mansfield* in *Tindall v. Brown* (b).)

The doctrine, that what is *reasonable* is a question for the *Court*, pervades the whole system of our law.

Thus, in 2 *Inst.* 222., as to tolls, it is said, "What shall be deemed in law to be reasonable shall be judged, all circumstances considered, by the judges of the law, if it come judicially before them."

So, in *Co. Lit.* 56, 57, Lord *Coke* says, "Reasonable time shall be adjudged by the discretion of the justices before whom the cause dependeth; and so it is of reasonable fines, customs, and services upon the true

(a) 1 *Wils.* 232.(b) 1 *T. R.* 168.

state of the case depending before them : for reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the justices."

In *Swinton v. Molloy* (a), an action of false imprisonment was brought by the plaintiff as purser of a man-of-war, against the defendant the captain. The defendant pleaded a justification for a supposed breach of duty. In evidence, it appeared that the defendant had imprisoned the plaintiff for three days without enquiring into the matter, and had then released him on hearing his defence. Lord *Mansfield* ruled as matter of law, that such conduct on the part of the defendant was not a proper discharge of his duty ; therefore, that his justification under the discipline of the navy failed him. His Lordship did not leave the matter to the jury.

And even in *Beckwith v. Philby* (b), which may be relied on by the other side, the learned Judge first gave his opinion, that the arrest and detention were lawful, if the jury should be of opinion that the defendants had (*i. e.* upon the facts proved) reasonable cause of suspecting the plaintiff of felony. He did not, as was done in this case, leave the whole matter to the jury.

But the case of *Beckwith v. Philby* cannot be reconciled with former authorities, unless it be understood that the Judge gave his opinion as to there having been reasonable and probable cause, in case the jury should find that the defendants acted *bonâ fide* upon such reasonable and probable cause.

Secondly, the Judge should have left to the jury the question, Whether the Defendant had reason to suspect that the Plaintiff would *escape* ?

A constable ought not to arrest without a warrant, unless there be reason to suspect an escape, if he waits to procure a warrant. Here, the Plaintiff was well

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(a) 1 T. R. 537.

(b) 6 B. & C. 637.

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known as a respectable resident in *Cheltenham*, and she ought not to have been taken from her bed at night, or forced to quit her house. The Defendant knew he might find her in the morning. She was a female, and old, and there was no chance of her attempting to escape. If such a proceeding were allowable, the most respectable individuals, even judges themselves, might, upon the unfounded assertions of any unprincipled person, be dragged from their beds to a prison. But, even in the execution of his duty (and where the arrest is admitted to have been well founded), a constable can do nothing more than is *necessary* to *prevent* an *escape*. In *Wright v. Court* (a) the *Court* held, that a constable could not justify handcuffing a prisoner, unless he has attempted to escape, or unless it be necessary, to prevent him from doing so.

According to the older authorities, (4 *Inst.* 177.) even a warrant could not be granted to search a house, on bare suspicion, before the stats. 1 & 2 *Ph. & M. c.* 13. and 2 & 3 *Ph. & M. c.* 10.; and *Samuel v. Payne* (b) is the first case which establishes that a constable may justify arresting a party without a warrant, upon a reasonable charge of felony. But still this can be done only in cases where escape is probable, 2 *Hale*, 91. 1 *Hale*, 567. 589.; and where the constable himself knows of the felony.

In *Ledwith v. Catchpole* (c), *Buller J.* says, “If the constable acts upon suspicion, must it not, to make it a justification, be a reasonable ground of suspicion in his own mind, and within his own knowledge, and not merely the information of others; for if it is not so, he takes upon himself to judge of the evidence of others, when he ought to go before a magistrate, who is the proper judge.”

(a) 4 *B. & C.* 596.(b) *Dougl.* 359.(c) *Cald.* 291. 23 *G.* 3.*Ledwith*

Ledwith v. Catchpole differed from *Samuel v. Payne*, in this respect, that no charge was made: but a felony had actually been committed; and two of the judges held, that, under the circumstances, the constable was justified. But the probability of escape, if the officer had not acted, seems to have been a ground of their decision. Lord *Mansfield* says, "Upon a highway robbery being committed, an alarm spread, and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea ports, it would be a terrible thing, if, under probable cause, an arrest could not be made; and felons are usually taken up on descriptions in advertisements." That is, not only probable cause of suspicion of the crime, but probable cause to fear an escape.

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The point in *Samuel v. Payne* was raised on demurrer in a case in the Year-book, in *Hilary* term 7 *Hen. 4.* (a): the Court inclined to the doctrine of *Samuel v. Payne*; but the case was adjourned. But it is material to observe, that the plea of justification stated circumstances in which an escape might probably have been apprehended. The plea was, "that certain persons came to the defendant, the bailiff, in *London*, and told him that the plaintiff and another were come into *London* with certain cattle which were stolen, as it seemed to them. Upon which he went to the plaintiff and the other person, and found the cattle *en un obscur lieu*, in a house, and upon that arrested them."

The parties being strangers in *London*, and the cattle in concealment, the probability of escape was great.

It would be of serious consequence to the liberty of the subject, and the peace and comfort of society, if a constable is to be empowered to arrest on his own suspicions and judgment, where he has no reason to fear

(a) 7 H. 4. 35. pl. 3.

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escape, and may with propriety lay the case first before a magistrate.

A rule *nisi* having been granted,

Ludlow Serjt. shewed cause. The learned Judge's direction to the jury was in substance correct. By desiring the jury in effect to find, whether the constable acted on a belief of the representation made to him by Miss *Hamerton*, the learned Judge impliedly decided that that representation, if believed, formed a probable ground for the apprehension of the Plaintiff.

The direction was in substance conformable to that in *Beckwith v. Philby*, a case in which the law on the subject was well considered. As to the alleged omission to leave to the consideration of the jury the question, whether or not the Defendant had employed the precise measure of coercion necessary for his purpose, such a question might have arisen if the Plaintiff had been loaded with fetters; but, short of apprehension, no precaution would have been adequate to ensure her forthcomingness, except the placing a guard round her house all night, a step totally unfitted to the occasion, and probably not in the constable's power.

Russell, in support of his rule, relied on the authorities before cited.

BEST C. J. This was an action for false imprisonment. The Defendant, as a constable, gave in evidence, under the general issue, circumstances to shew that in the execution of his duty he had a probable cause for apprehending and imprisoning the Plaintiff. The jury having found a verdict in his favor, a new trial has been moved for, on the ground that the jury were misdirected; first, in the circumstance that they were left to consider whether the Defendant had probable cause
for

for arresting the Plaintiff; and, secondly, in the circumstance that they were not requested to consider whether or not the Defendant had resorted to a degree of coercion unnecessary for the occasion.

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The question of probable cause is, no doubt, a question for the Judge; but the jury must first find the facts which are supposed to constitute the probable cause; and it is sometimes difficult to draw the line between the law and the fact. It has been argued in effect, that if the jury had intimated their belief of the facts, the Plaintiff ought to have been nonsuited. But on these facts the Judge could not properly have directed a nonsuit. It was necessary to leave to the jury, whether, admitting the facts, the Defendant acted honestly; for if he did not, — if he acted without giving credit to the statement made to him by *Hamerton*, — the verdict ought to have been against him, and with heavy damages. But the learned Judge tells them, “If you believe the facts, and thence infer that the Defendant was acting honestly, you must find for him.” This was saying in substance, that, in his opinion, the facts, if believed, furnished a probable cause for the Defendant’s conduct. But if the direction to the jury were, on the whole, substantially right, a mere inaccuracy of expression will not render it necessary to have recourse to a new trial. This direction was substantially right. It was for the jury to say whether they believed the facts; and, if they believed them, whether the Defendant were acting honestly; in other words, whether the jury, under the same circumstances, would have done as he did. It has been further contended, that without a warrant from a magistrate a constable has no right to apprehend upon suspicion, unless there be danger of escape if he forbear to apprehend. The law, however, is not so. For though a private individual cannot arrest upon bare suspicion, a constable may. This has been decided in so many

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cases, that it is unnecessary to refer to them; and unless the law were so, there would be no security for person or property. Then, had the constable in this case reason to suspect that a felony had been committed? *Hamerton* told him that the Plaintiff had robbed her, and that her suspicions were confirmed by an anonymous letter which had fallen into her hands. The constable had no means of knowing that this letter had been written by *Hamerton* herself, and if he believed it genuine, it afforded ample ground for suspicion. That has all been left to the jury, and they have come to the same conclusion. A passage has been referred to in 4 *Inst.* 177. to shew that a constable cannot arrest upon suspicion; but the words are, "bare surmise," which is a very different thing. "One or more justices of peace cannot make a warrant upon a bare surmise to break any man's house to search for a felon, or for stolen goods; for they being created by act of parliament, have no such authority granted to them by any act of parliament; and it should be full of inconvenience that it should be in the power of any justice of peace, being a judge of record, upon a bare suggestion to break the house of any person, of what state, quality, or degree soever, and at what time soever, either in the day or night, upon such surmises."

And the authority of *Hale*, even in the passage cited, is against the position contended for. "A constable may, *ex officio*, arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice of peace." — "If a felony be committed, and *A.* acquaints him that *B.* did it, the constable may take him and imprison him, at least till he can bring him before some justice of peace. But if there be only an affray, and not in the view of the constable, it hath been held he cannot arrest him without a warrant from the justice; but it seems he may, to bring

bring the offender before a justice, though not compellable."

Then, *Samuel v. Payne* is an express decision that a constable may justify an arrest upon reasonable suspicion.

It has further been insisted, that, at all events, an undue degree of coercion was resorted to; that the Plaintiff ought not to have been apprehended at night, or compelled to go from her home. But what was the constable to do? Was he to go home? or to watch the Plaintiff's house all night? *Hamerton* had required his assistance, and if the Plaintiff had escaped he would have been responsible. A person in his situation has little discretion left to him; if a charge be made he must act; and the Defendant would not have been justified if, after the information he had received, he had not gone that night to the Plaintiff's house: he used no unnecessary violence; he did not break the door: and he was bound to make the arrest. The case has been ably argued, and is of great importance. It is important that constables should not abuse their authority, and equally so that they should not be discouraged in the due discharge of their duty. We cannot uphold the notion that a constable is not permitted to go into a house at night to apprehend a person suspected. Severity, indeed, is not necessary, and parties charged should be treated according to their condition; but it is necessary that the constable should have their persons secure. The sufferings of the Plaintiff in this cause are indeed to be regretted; but they have been occasioned by the wickedness of *Hamerton*, of whom the Defendant was the innocent instrument, and therefore the rule for a new trial must be discharged.

PARK J. I do not impeach any of the cases that have been decided on this subject, nor had I ever a

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doubt that it is the province of the judge on such occasions to determine the point of law; but as that must be compounded of the facts, and as the jury must decide on them, my practice has been to say, "You are to tell me whether you believe the facts stated on the part of the Defendant, and if you do, I am of opinion that they amount to a reasonable and probable cause for the step he has taken." I do not direct a nonsuit, because the fact is so closely connected with the law. The direction of the learned Judge in this case is conformable to that mode of proceeding, and is substantially the same as in *Hill v. Yates*, and *Beckwith v. Philby*. *Littledale J.* in that case directed the jury to find a verdict for the defendants, if they thought upon the whole evidence that the defendants had reasonable cause for suspecting the plaintiff of felony; and Lord *Tenterden* said, "Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury."—"There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected, until enquiry can be made by the proper authority." The direction of the learned Judge in the present case was tantamount to this: "If you think the Defendant acted *bonâ fide*, I am of opinion he had probable cause for the course he pursued."

It has also been objected, that there was no necessity for apprehending the Plaintiff at night, and a case has been put of the apprehension of a judge at his own house. But was the constable to stay in the street all night,

night, after the information he had received; or in the Plaintiff's room? No. And the very circumstance of the magistrate's committing the Plaintiff the next day affords a presumption that the Defendant was acting *bonâ fide*. The circumstance of a felony having been imputed to the Plaintiff was a sufficient reason why the constable should apprehend an escape.

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BURROUGH J. A constable has always reason to apprehend an escape when he receives information of this nature; and if he did not act upon such supposition, there would be no safety for property in *London*. I am clearly of opinion that the Defendant might have justified this conduct in a plea, stating that a felony had been committed, and that he had been informed of it. What *Hamerton* told him, added to the letter she produced, was sufficient to raise a strong suspicion in the mind of a constable; and such a justification could not have been got rid of but by denying the facts alleged. Here they were true, and if the constable had ground to believe them, that was sufficient for him. Nothing but the subsequent conviction of *Hamerton* has raised the difficulty in this case; but the question is, on what grounds and motives the constable acted at the time. He had reasonable ground to believe the charge, and it was his duty to apprehend the Plaintiff; that being so, the learned Judge's direction was right in substance.

GASELEE J. On a review of all that has been said, I do not alter the opinion I had formed at the trial. I said to the jury in substance what has been stated; but I never meant to leave to them the question of legal probable cause; for I had the case of *Beckwith v. Philby* before me, and I was requested to nonsuit the Plaintiff. I could not do so upon the Plaintiff's case, though, in similar causes, I have occasionally done so, after hearing

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the Defendant's case; but when there is any doubt as to the facts, they must be found by the jury. By leaving them to the jury in this case, and also whether the Defendant acted *bonâ fide*, I intimated, in effect, that if they were satisfied on that head, the Defendant stood excused.

As to the point about the probability of escape, none of the authorities cited go the length of saying that the constable cannot detain, except where he has reason to apprehend an escape. The rule, therefore, must be

Discharged.

Feb. 7.

HUDSON v. REVETT.

1. The Defendant executed a deed, conveying his property to trustees to sell for the benefit of creditors, the particulars of whose demand were stated in the deed; a blank

THIS was an issue directed by the Court of Common Pleas to try whether certain deeds of lease and release, and an accompanying deed of trust, were the deeds of the Defendant, and if so, whether they had been obtained by fraud, covin, or misrepresentation.

The lease and release bore date the 25th and 26th of November 1825 respectively; the deed of trust the latter day; and the object of the deeds was to effect a conveyance was left for one of the principal debts, the exact amount of which, being subsequently ascertained, was inserted in the blank the next day, in the Defendant's presence, and with his assent. He afterwards recognized the deed as valid in various ways, particularly by being present when it was executed by his wife, and by joining her in a fine to enure to the uses of the deed: Held, that the deed was valid, notwithstanding the filling up of the blank after execution.

2. The attorney who had prepared the deed, on the retainer of the trustees, was held a competent witness in an issue directed by the Court, to try its validity, although one of the trusts was to defray the charges of preparing the deed, and although he was Defendant in another action, his success in which depended on the validity of the deed.

At all events, in such an issue, the Defendant was held not entitled to a new trial, on account of the admission of the testimony of such witness, justice having been done.

veyance

veyance of *Revett's* property to *Hudson*, in trust to raise money by sale of it for the payment of of *Revett's* debts, with a trust, as to any residue, in favour of *Revett*; and “in the first place, for the trustee to pay and defray the costs, charges, and expenses of all parties thereto attending the preparing, settling, completing, and executing those presents, and the several indentures of lease and release therein referred to.”

At the trial before *Holroyd J.* last *Suffolk* Summer assizes, Mr. *Brown*, the attorney who prepared the deeds, and was also a party to the deed of trust, stated, that on *Monday* the 28th of *November* 1825, the Defendant being then a prisoner in the King's Bench prison, he, *Brown*, on the part of the Plaintiff and other creditors, and acting, as he conceived, for all parties, went, accompanied by *Columbine*, the attesting witness, to the Defendant in the prison, for the purpose of procuring the execution of the deeds. That they corresponded exactly with drafts which had before been assented to and signed by the Defendant; that blanks were left for the amounts of the debts of various creditors, which were then filled up, with the exception of the blank for the debt of one *Mills*, a creditor; that *Mills*, who was present, claimed 16,000*l.* odd; but that the Defendant shewed an account, reducing *Mills's* debt to 14,858*l.* 8*s.* 8*d.*, and said he had vouchers by which he could confirm the account. The account was admitted, subject to the production of these vouchers; and it was agreed that the blank for *Mills's* debt should be filled up when they were produced. The Defendant and *Mills* then executed the deed, leaving the blank to be filled up as above mentioned. This statement was confirmed by the attesting witness, the only other person present. The next day *Brown* and *Mills* attended the Defendant again; but *Columbine* was not present. The Defendant produced the vouchers in question; the

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balance was struck: *Brown* filled up the blanks with the sum of 14,858*l.* 8*s.* 8*d.*, and then went away, taking with him the deeds for the purpose of procuring their execution by other parties. The instrument at that time had a deed-stamp (not *ad valorem*), and no new stamp was added. The Defendant left the prison shortly afterwards, and the deeds were executed in his presence by his wife, (who also joined in a fine to enure to the uses of the trust-deed,) under his sanction, when he was at liberty.

The Plaintiff, the trustee, did not execute the trust-deed till the end of the ensuing *December*. Many letters were subsequently written by the Defendant, in which he not only treated the deeds as valid instruments, but ordered the occupiers of the property to pay their rents to the Plaintiff, and the steward of the manor to deliver up his books and the rolls of the manor to *Brown*. It appeared, further, that he had told one *Chapman* that he had executed the deeds, and had gained time; — also, that he had carried into effect the fine that was to pass his wife's interest.

Brown was objected to as a witness, as having an interest to support the deed in order to recover his own charges, and as being defendant in an action of trespass, in which his defence rested on a claim to property under this deed. See *Revett v. Brown. (a)* But it was answered, that though by an express clause in the deed the trustee was authorized to defray those charges out of the property, he was personally liable to *Brown* under his retainer; that *Brown* could recover against him only by virtue of that retainer, and that the deed would be no evidence in support of *Brown's* claim. The learned Judge overruled the objection.

No evidence was offered on the part of the Defendant; but the following passage in *Bull. N. P.* p. 267. was

(a) *Ante*, vol. v. p. 7.

relied

relied on: "If there be blanks left in an obligation in places material, and filled up afterwards by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered:—as if a bond were made to C., with a blank left after for his Christian name and for his addition, which is afterwards filled up."

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Holroyd J. told the jury it did not appear in the passage cited that the alteration was made in the presence of the party, but that, if in such a case there was that which amounted to a redelivery, and shewed that the party meant the deed should be acted on in its altered state, the alteration being made in his presence would amount to a redelivery, and the deed would be his in its altered state; he referred to *Goodright d. Carter v. Straphan (a)*,—where the redelivery by a *feme*, after *baron's* death, of a deed delivered by her whilst *covert*, was held a sufficient confirmation of the deed to bind her without re-execution or re-attestation, — and said, that circumstances alone might be equivalent to a redelivery. Then, observing on the fact that the blank in the present case had, according to a previous arrangement, been filled up in the Defendant's presence, and with his consent, that he had afterwards assisted at and sanctioned the execution of the deed by his wife, and had acted upon it as a valid instrument, he said, that unless the jury disbelieved the evidence, there was abundant ground for their considering this deed as the deed of the Defendant:—of fraud or covin no evidence had been offered.

The jury found that the deeds were the deeds of the Defendant, and that the execution of them had not been obtained by any fraud, covin, or misrepresentation.

(a) *Coamp.* 201.

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Wilde Serjt. moved for a new trial, on the ground that *Brown* ought not to have been admitted as a witness, and that the deed was void, having been altered in a material particular after its execution, without any redelivery. There was also an objection to the stamp.

A redelivery, he contended, could only be implied where there was no evidence to rebut the presumption; here, the circumstance that the deed was always out of *Revett's* possession was evidence sufficient to rebut any such presumption. In *Goodright v. Straphan* the deed had never been executed at all before the death of the husband, for an execution by a *feme covert* was altogether void: here the deed was once well executed, and there could be no new execution actual or implied without a new stamp. A rule *nisi* having been granted,

Storks and *Russell* Serjts. shewed cause. If *Revett* was present when the blanks were filled up, the validity of the deed is unimpeachable. But even if he were not, the transaction may be upheld if the insertions were made with his assent, and in conformity with the original intention and agreement of the parties.

It was settled between the parties that the deed should be executed, subject to the blanks being filled up, when the amount of debt should have been ascertained and agreed upon. They were filled up, therefore, according to the intention of the parties, and there was no *alteration* of the deed, but a *completion* of it, according to the intentions of the parties.


Under these circumstances it may be contended, first, that the deed remained the deed of the parties (without redelivery) notwithstanding the insertion.

The only authority cited to the contrary is *Bull. N. P.* 267. "If there be blanks left in an obligation in places

places material, and filled up afterwards by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered. As, if a bond were made to C., with a blank left after for his Christian name and for his addition, which is afterwards filled up." And in support of this position the learned writer cites 2 *Roll. Ab.* 29. (*Faits ; Interliner*); but the passage there is, "Si un fait soit *alter* en point material per le plaintiff mesme ou per ascun estranger sans le privitée del obligée; soit ceo interlineation, addition, rasure, ou per le traction d'un penn per le middest d'ascun parol, le fait per ceo devient void. *Co.* 11. *Pigot's* case, 27., per curiam resolve; car ceo ore n'est mesme fait. Come si un obligation soit fait al un viscount pur apparer, &c. et en l'obligation le nosme del viscount est omitt, et puis le deliverie de ceo son nosme est interline, ou per l'obligée ou per un estranger sans son privitie, encore le fait est void per ceo." So that *Pigot's* case is the fountain; and that case does not support the dictum of *Buller J.* as to the addition; on the contrary, a special verdict found that the bond was made by *Pigot* the defendant, and two others, who were held and firmly bound to the plaintiff, *Benedict Winchcombe*, Esq. in sixty pounds; that the plaintiff was sheriff of the county of *Oxford*, and the condition was for the appearance of one of the parties in the King's Bench to answer in a plea of trespass; that the bond was delivered by *Pigot* as his deed to the use of the plaintiff, and that after the delivery of the deed, the words "*Sheriff of the county of Oxford*" were interlined after the words *Benedict Winchcombe*, Esq., and before the words sixty pounds; *sine notitia, Anglice*, the privity or command of the said *Benedict*. The Court decided, on the ground that this was an addition by a stranger, without the privity of the obligee, on a point

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point not material in any thing that appeared to the Court; and judgment was given for the plaintiff. Neither does that case meet the point of the insertion of that which has previously, and at the time of the execution of the deed, been agreed to be inserted. But in *Markham v. Gonaston* (a), even such previous agreement was held, according to the ultimate decision of the case, not essential to the validity of the deed. *Markham*, at the request of Sir *Francis Willoughby*, was bound in a statute with Sir *F. Willoughby* to *W. Tracy*, Esq. as his surety; and upon this, Sir *F. Willoughby* caused *Gonaston*, his servant, to make a counter bond, in which Sir *F. Willoughby* and one *Geoffrey Fox* were bound to *Markham*, to save him harmless from the same statute; and Sir *F. Willoughby* commanded his servant to leave out of the condition of it the Christian name of *W. Tracy*, the place of his habitation, the county, and his addition. The servant did so accordingly, and then *G. Fox* sealed and delivered the counter bond as his deed, to the use of *Markham*. Afterwards, the servant *Gonaston*, by the command of his master, Sir *F. Willoughby*, and by the assent of *G. Fox*, inserted in the blanks the Christian name of *W. Tracy*, the place of his habitation, the county, and his addition, and then Sir *F. Willoughby* sealed and delivered the obligation. An action of debt was brought upon this bond, in the Common Pleas, against *G. Fox*, who pleaded the filling up these blanks after the bond was sealed and delivered, and so, not his deed. Issue was taken on the filling up, &c., and upon proof that they were so filled up, the plaintiff *Markham* was nonsuited. Then *Markham* brought an action on the case against *Gonaston*, in the nature of deceit, for destroying the effect of the bond.

(a) *Cro. Eliz.* 627.

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The defendant pleaded the special circumstances of the filling up by order of his master, to which the plaintiff demurred, and it was adjudged for the plaintiff. The *Court* held that the condition was altered by the words inserted, "for whereas before it did not appear to which of the *Tracys* the recognizance was entered, it is now made certain; and it may be, that it was now to another man than in truth it was." But *Popham* made this observation, viz. "That if it had been appointed by the obligor (viz. *G. Fox*) before the ensealing and delivery thereof, that it should be afterwards filled up, it might then, peradventure, have been good enough, and it should not have made the deed void." And it was afterwards adjudged good in the Court of King's Bench, *Markham v. Gonaston*, (*Moore*, 547.) where, after giving a short report of the case according with *Cro. Eliz.* the reporter says, *mes nota*, that afterwards the plaintiff brought a new action on the bond against *Fox*, who pleaded the special matter, and concluded that therefore it was not his deed, to which *Markham* replied, that the blanks were filled up with the assent of Sir *Francis* and *Fox*; to which *Fox* demurred, and it was adjudged for the plaintiff. So in *Paget v. Paget* (a), "a deed of revocation and a new settlement made by that deed, though after the sealing and execution thereof blanks were filled up, and not read again to the party, nor resealed and executed, was yet held a good deed." The decision in *Moore* is recognized in *Zouch v. Clay*. (b) That was an action of debt on bond. *A.* and *B.* delivered the bond to *C.*, and after, by consent of all parties, the name and addition of *D.* was interlined, and he also sealed the obligation and delivered it. And if the obligation by this alteration were made void against

(a) 2 *Chan. Rep.* 410. cited in *Vin. Abr. Fairs* (U).(b) 2 *Lev.* 35.

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A. and *B.*, or not, was the question. But by *Hale* and the whole Court it was adjudged that it was not, and that it is the obligation of all three, and so is *Moore*, although in *Cro.* it was before adjudged contrary. *Texira v. Evans* (a) (mentioned by *Wilson J.* in the argument upon *Master v. Miller* in error from the King's Bench) is strong in point. The bond had been executed in blank, and the plaintiff had advanced money on it to a broker, after which the names and sums had been inserted in the blanks by the broker. The defendant pleaded *non est factum*; and Lord *Mansfield* ruled that the bond was well executed, and that the broker was to be considered as the attorney authorized by the defendant to fill up the blanks, and the plaintiff had a verdict. The case of *Doe d. Lewis v. Bingham* (b) shews clearly that a deed requiring to be executed by different parties may be considered as one entire transaction, operating as to the different parties to it, from the time of the execution by each, but not perfect till the execution of it by all the conveying parties; and if so as to parties, why not as to sums agreed to be inserted? In *Matson v. Booth* (c), it was decided as to a *bail bond*, that the addition of another obligor after the bond had been executed by four others, but had not been accepted by the sheriff, did not vacate the bond, or make a new stamp necessary. That case established two important points; first, that such an instrument until completed is considered as *in fieri*, and in the nature of an *escrow* only: — and a deed may be in the nature of an *escrow* only, from circumstances and the nature of the transaction, without the formal and apt words spoken of in *Shepherd's Touchstone*, 50, and 60: therefore, where a deed is to be

(a) 1 *Anstr.* 228. (b) 4 *B. & A.* 672. (c) 5 *M. & S.* 223.

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executed by several parties, and if any of them refuse, the deed will be inoperative, a party who executes first must be taken to execute and deliver it as his deed conditionally in case the others also execute: so if the insertion of a sum be necessary to give the instrument effect, a party who executes before such sum has been ascertained must be understood as executing conditionally, and to give the deed effect upon such sum being ascertained and inserted: until insertion, it is therefore an escrow; upon insertion, and not till then, it becomes the deed of the party who executed, by relation to the time of the execution:—secondly, that the concurrence of the agent of the obligors was of equal force with the concurrence of the obligors themselves. And this will apply to the objection of the insertion of the sum not having been made in the presence of *Revett*, (if that were so) because *Brown* was authorized to make the insertion. *Bayley J.* says, “The addition was made with the concurrence of the agent of the obligors, at a time when the bond could be considered no otherwise than as in the nature of an escrow; and being made with the concurrence of the agent of the obligors, it is the same as if it had been with their concurrence, which brings the case within the authority of *Zouch v. Clay*.”

The deed in question therefore is good, and the deed of *Revett*, without any re-execution or redelivery.

But if not good without a redelivery, it would be clearly so if such redelivery, or what was tantamount to it, took place.

The effect of a re-execution is shewn in the case of *Coke and Another, Executors, v. Brummell*. (a) *E. H. Delmè* (who afterwards took the name of *Radcliffe*),

(a) 2 *B. Moore*, 495.

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as surety for *Brummell*, executed a joint bond and warrant of attorney to secure an annuity to one *Crick*. After the execution by *Radcliffe* and *Brummell* it was discovered that part of *Radcliffe*'s Christian name (*viz. Henry*) had been omitted in the body of those instruments, and he re-executed them after such name had been inserted, without the knowledge of *Brummell*.

In an action brought against *Radcliffe*, in the Court of King's Bench, on the bond, he pleaded a judgment recovered against himself and *Brummell*. And afterwards the Court of Common Pleas refused to set aside, on his application, a joint judgment entered against them on the warrant of attorney, inasmuch as the instrument was not defeated by such insertion of *Radcliffe*'s Christian name, and as he had recognized the validity of the judgment in the action brought against him on the bond. *Gibbs C. J.*, in delivering the judgment of the Court, says, "This warrant of attorney was given as a collateral security to an annuity bond in which the defendant *Brummell* was the principal, and *Radcliffe*, who now makes this application, his surety. At the time the bond and warrant of attorney were executed, the grantee was not aware that *Radcliffe* was called *Henry* as well as *Emilius*, and he did not discover it until he saw his signature at the foot of those instruments. He was then fearful that the warrant of attorney might prove defective, and, therefore, procured *Radcliffe* to re-execute it, having previously caused an alteration to be made throughout the body of it, by interlining and inserting the word *Henry* between *Emilius* and *Delmé*. In point of fact, the warrant of attorney was perfect without this alteration; but there can be no doubt but that judgment may now be entered upon it, *Radcliffe* himself not only having consented to such alteration but having re-executed the instrument. Besides, in an action
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on the bond brought against him in the Court of King's Bench, he pleaded a judgment recovered by the testator against himself and *Brummell*, thereby not only recognizing the validity of the judgment, but by making use of it, defeating that action; and after that he makes this application, whereby he seeks to set it aside. Under these circumstances, the Court are of opinion that they cannot do this; first, because the nature of the securities was not defeated by the insertion of the word *Henry*, to which alteration *Radcliffe* himself was a party; and, secondly, because he afterwards recognized the judgment as being legally entered up, and availed himself of it in the action brought in the Court of King's Bench."

It is clear, however, that a re-execution is not necessary. Where the first delivery, from any circumstances, requires confirmation, a second delivery will suffice. If the first delivery is considered (from the blanks and circumstances of a future insertion then agreed upon) to have been imperfect, and to require something further to be done, then a second delivery, or that which is tantamount, will supply the defect. And the Court will not consider the first delivery as a complete delivery, if the effect of so considering it would be to avoid the deed. *Perkins*, s. 154. says, "It is to be known that a deed cannot have and take effect at every delivery as a deed; for, if the first delivery take effect, the second delivery is void." A second delivery may, therefore, in some cases, be merely an execution and confirmation of the first, *ut res magis valeat quam pereat*.

In *Butler and Baker's case* (a), (a case which was argued twenty-one times severally,) the case of *Jennings v. Bragge* (87 Eliz.) is given at the end: there, amongst other resolutions, is the following: — "It was resolved, that to some intent the second delivery hath relation to

(a) 3 Rep. 35 b.

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the first delivery, and to some not, and yet, in truth, the second delivery hath all its force by the first delivery, and the second is but an execution and confirmation of the first; and, therefore, in case of necessity, *et ut res magis valeat quam pereat*, it shall have relation, by fiction, to be his deed *ab initio* by force of the first delivery."

Then, has there been a second delivery in this case?

Goodright dem. Carter v. Straphan establishes this point, viz. that circumstances alone may be equivalent to a redelivery. Lord *Mansfield*, after citing two cases from the year-books, which confirm the proposition, that it is not necessary for a deed to be re-executed or re-attested, but redelivered only, says, "Now, delivery is an act *in pais* only. The question, then, is, Whether the law has laid down any precise form in which delivery must be made, or whether circumstances may not be equivalent to it without actual delivery? Lord *Coke*, in his commentary on *Lit. s. 36.*, says, As a deed may be delivered to the party without words, so a deed may be delivered by words without any act of delivery; as if the writing sealed lies upon the table, and the feoffor or obligor says to the feoffee or obligee, 'Take up the said writing: it is sufficient for you,' or, 'It will serve your turn: it is a sufficient delivery.' 2 *Roll. Abr.* 26. pl. 2. And *Goodright v. Gregory* (a) is to the same effect. No manual tradition or handing over of the deed to the grantees is necessary. In *Doe dem. Garnons, v. Knight* (b), the Court of King's Bench held, that though the grantor kept the deed in his own possession, it was a valid and effectual deed, and that *delivery* to the party who was to take by the deed, or to any person for his use, was not necessary. In the present case, after a redelivery, *Revett* sent the deed to his wife, and was

(a) *Lloft*, 339.

(b) 5 *B. & C.* 671.

present when she executed it. The fine, too, being levied in pursuance of a prior covenant, shews still more distinctly that the whole must be taken as one entire transaction, and operate as one assurance. This principle is established in *Doe dem. Odiarne v. Whitehead* (a), where it was held, that if a fine be levied in pursuance of a covenant in a prior conveyance of an estate tail, as where tenant in tail conveys his estate by lease and release, and covenants in the release to levy a fine, which is done accordingly, the lease and release and fine will be considered as one assurance, and will operate (by means of the fine) to discontinue the estate tail. And if it will thus be considered when it acts to the destruction of an estate, *à fortiori* should it be so when it goes to preserve and support a conveyance according to the intention of the parties.

The Court relieved the learned Serjeants from arguing the point about the stamp, or the admissibility of *Brown's* testimony.

Wilde. First, the question touching the re-execution of the deed ought not to have been left to the jury under the circumstances of this case, which is pregnant with suspicion. The party sought to be charged was a prisoner; no separate professional adviser was present on his part; blanks were left in the deed for a heavy sum; his whole property was conveyed away; and the attesting witness was not present at the supposed re-execution. It would be of most dangerous consequence, and would render the solemn execution of deeds a useless ceremony, if a re-execution could be presumed after the original instrument had been so materially altered. But the deed was perfect when it was first executed, and, therefore, a re-execution, which implies that the

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(a) 2 Burr. 704.

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deed is previously imperfect, could not have any operation. It was signed, sealed, and delivered: the estate had passed out of the relessor, and had vested in the relessee, and the attestation was such as to shew the deed to be a perfect instrument. According to *Perkins*, s. 154. (a passage cited by Lord *Mansfield*), "If the first delivery take any effect, the second delivery is void." As to the instrument's operating as an escrow till the blanks were filled up, *Com. Dig. Fait. (A. 3.) Shep. Touch. 58.*, and 4 *Cruise*, 36., are express authorities to shew, that if a deed be delivered as an escrow, it must be so delivered in terms, and the fact must be noticed in the attestation. If the re-execution gave effect, from what time was such effect to commence? from the first or the second delivery? and if from the second, would the deed under its general words convey property accruing in the intermediate time? or would property, disposed of subsequently to the first delivery, be excluded from the operation of the deed? But even admitting a second delivery, the deed ought to have had a second stamp, and at all events was avoided by the alterations then made in it; for,

Secondly, the rule of law is clear and undisputed, that any alteration of a deed in a material point by insertions, erasures, or otherwise, will avoid the deed, even though the alteration may have been innocently or laudably intended; and the application of this rule in particular cases ought not to govern the decision of the Court; the applications of the rule may have been correct or incorrect; the rule itself cannot be misunderstood, and has never varied.

But the result of all the cases, from *Zouch v. Clay* to *Doe v. Bingham*, is, that if by the alteration in the deed the contract be altered, the deed is void. And *Markham v. Gonaston* is referred to by *Buller J.* for the purpose of establishing that principle, and not to indicate his

his approbation of the particular decision. But that was a case on a bail-bond, and the liability of the party charged could not be changed by the interlineation. The note of *Paget v. Paget* is so short, that it does not appear what was the nature of the alteration, but the case, as stated, cannot be law. *Coke v. Brannell* was an application to the equitable jurisdiction of the Court upon a warrant of attorney, which entitled the Court under the annuity act to decide according to the good conscience of the case. So that the question still is, "Has the contract been varied?" Here the contract was essentially varied by the insertion of the sum alleged to be due to *Mills*. Before that insertion, the contract was generally to pay the Defendant's creditors the debts due from him. Under such a contract it was still open to him to dispute and to ascertain correctly the amount of those debts; but by the insertion of a specific sum as due to *Mills*, he was engaged to pay that sum to *Mills* whether justly due or not. If the trust-deed be void, it is clear, that as the others all constitute one conveyance, the grantees will stand seised for the benefit of the grantor. Lord *Cromwell's* case. (a)

Thirdly, there ought to have been an *ad valorem* stamp, and not a common deed stamp, as the conveyance by lease and release, if not a mortgage, was at all events a conveyance to effect the absolute sale of the property. The trust deed being void, is out of the question, and then the conveyance by lease and release is not within the scope of the exception in the stamp acts in favour of deeds made for the benefit of creditors generally. 55 G. 3. c. 184. sched. part 1. tit. *Mortgage*.

Lastly, *Brown's* interest rendered him incompetent as a witness; for not only were his expenses to be paid by virtue of the deed on which the cause depended, but his

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right to retain a verdict in an action pending against himself depended altogether upon the validity of the deed in question. A more direct interest in the event of the cause could not be created.

BEST C. J. This was an issue which the Court thought it right to direct, for the purpose of ascertaining whether these deeds had been properly executed, or were obtained by fraud. The jury have found that all the deeds were properly executed, and they have negatived the fraud. An application has been since made to grant a new trial on several grounds. First, that a witness was admitted who ought not to have been received. Secondly, an objection has been taken to the stamp, that the lease and release ought to have had an *ad valorem* stamp, and not a mere stamp upon a deed conveying property to be sold for the benefit of creditors. The third objection is, that the trust deed was a complete deed at the time the witness attested its execution in the King's Bench prison, and that the learned Judge ought not to have left it to the jury to presume another delivery; that if it was a perfectly executed deed, the alterations made subsequently to its execution, though with the assent of all the parties, render that deed a nullity; and that if the trust deed be a nullity, all the other deeds are useless, because they refer to this, and cannot stand as a complete conveyance without it.

I am disposed to agree, though it is not necessary to decide that point, that if the trust deed is to fall, all the deeds will fall. But I am of opinion that all the deeds must stand. And that will dispose of the objection to the stamp act, because it is admitted, that if the trust deed is to be incorporated in the assurance, it shews the intent of the parties was to convey for the benefit of creditors more than five, and comes within
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the exception of the stamp act. As to the admissibility of the witness, I do not think it necessary to decide that *Brown* could not in a court of law be considered as a competent witness, when the learned Judge, for whose opinion I entertain the highest respect, thought it right to receive him. But let us take it he was not; ought we in this case, who have sent this issue for the purpose of ascertaining facts which are to satisfy our minds, when we see that justice will be done, and has been done, whether that witness spoke the truth or not, ought we to send this cause down again? It is not like the trial of an action, where a party perhaps has a right, if a witness deposes to facts that are material, and he is not a competent witness, to call on the Court and say, 'I am entitled to have that verdict set aside, for it was found on evidence which ought not to have been given.' That is not our situation with respect to this cause, because this is the creature of our discretion, and, therefore, we are now to decide whether, under all the circumstances, it would be fit to send it down again. Now, when we recollect that *Chapman* proved all that was necessary to be proved to sustain this verdict; that *Chapman* is uncontradicted; — I allude to the conversation with the Defendant, when he acknowledged that he had executed the deed, and that these sums were engrafted into it; — when we recollect that the Defendant after this wrote letters to the different tenants, and in those letters acknowledged the execution of the deed; can we say it is fit in such a case, merely because some evidence was received which ought not to have been received, to send this question again to the consideration of a jury?

This brings us, therefore, to the great questions in this case. They have been divided into two. It has been first insisted that there was no perfect execution of the deed until the sum of 14,858*l.* was written in it; and if there was not a perfect execution of the deed up to

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that time, then it was competent for my Brother *Holroyd* to refer it to the jury, to consider whether they would not presume an execution of the deed after all the sums were written in and it was rendered a perfect deed. I am of opinion that this is a correct view of the case; and if it is, it comes precisely within the principle of the case to which my Brother *Holroyd* has referred, of *Doe d. Carter v. Straphan*. In that case a deed had been executed by a married woman, and, as such, was undoubtedly void. After the death of her husband, she, by various acts, confirmed this deed. The Court of King's Bench decided, that by the confirmation of the deed the jury were warranted in presuming a re-execution of it. Undoubtedly, in that case, Lord *Mansfield* refers to a passage in *Perkins*, where he says, "It is to be known that a deed cannot have and take effect at every delivery as a deed; for if the first delivery takes effect the second delivery is void; and in case an infant or a man in prison makes a deed and delivers the same as his deed, and afterwards when the infant comes to his full age, or the man in prison when at large delivers the same again as his deed which he delivered before as his deed, this second delivery is void." That brings us to the question, Was there any perfect delivery of this deed antecedent to the period when these sums were written in? If one looks at the deed, and particularly at that part of the deed which my learned brother has referred us to, it is quite impossible that the deed could be considered as having any operation till these sums were actually written in, because, what was the object of the deed? The object of all the deed was to convey the estates to trustees, that those estates might be sold, and that the proceeds of those estates might be applied to pay certain creditors' debts which were to be ascertained. In the preparation of the draft of this deed blanks were left for the

the insertion of the sums when those sums should be ascertained. When these parties met in the King's Bench prison, can it be said that that was a perfect execution of the deeds, when the sums that were due to these creditors remained unascertained? The operative part of the deed refers to the payment of particular sums, which, as then, were unascertained. It is quite clear, if nothing had passed at this time, that the deed could not be an operative deed until those sums were introduced, because the great object of the deed was the payment of those sums. I think, therefore, taking it in this point of view, that this was not to be considered as an execution of the deed,—that this was not a complete deed,—and that therefore the case falls within the authority of the case in *Cooper*, and not within the law which is extracted from *Perkins*.

This deed, as I have stated, undoubtedly was not to be considered as complete until the sums were introduced. But it has been said, if it was delivered to the party it could not be delivered as an escrow, unless so delivered, in terms. Perhaps, technically speaking, this is so; because a deed delivered to a party is not an escrow: a deed delivered to a stranger is an escrow till something is done: but though it is delivered to a party, there are cases, and in the same page, to which my learned brother referred, to shew that it is not a perfect and complete deed; *Com. Dig. tit. Fails (A 3.)*: “So if it be once delivered as his deed, it is sufficient, though he afterwards explained his intent otherwise, as if an obligation be made to A. and delivered to A. himself as an escrow, to be his deed on the performance of a condition, this is an absolute delivery, and the subsequent words are void and repugnant.” The authorities referred to in the text, in support of this position, are at least conflicting; but in the next division (A 4.) it appears that this position about delivery as an escrow is

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is merely a technical subtlety; for the learned writer says, "If it be delivered to the party as an escrow, to be his deed on the performance of a condition, it is not his deed till the condition is performed, though the party happens to have it before the condition is performed." This he lays down on his own authority, without referring to any case; and I am warranted in saying we cannot have a better authority than that learned writer.

Let us see how that doctrine applies to the present case. The parties meet; something is to be done before a complete deed can be made; the sums are to be ascertained which the different creditors are to be paid. That cannot be ascertained that day, it is ascertained at a subsequent day, and they are written in. Take it, if you please, that this is a delivery of the deed as a deed, is it not a delivery of the deed in the language of Lord Coke, upon condition; that is, upon condition that something is to be done, which at that time was not done? That something is afterwards done: then, and not till then, it becomes a perfect deed. It seems to me, therefore, without touching any of the cases that have been decided on the operation of deeds, we may say that this deed was not a complete deed, executed so as to have effect in the hands of the parties until these sums were written in.

I shall not, after what I have said, travel through the different cases that have been cited with respect to the alteration of deeds; but I beg not to be taken as deciding, that if a deed be altered with the consent of all the parties, after it is executed, it is not to be considered as a good deed. I think, if we were driven to examine that question, it would be found that, in these times, whatever might have been thought formerly, if all the parties assent to the alteration of a deed, it will, in its altered shape, be a good deed; but I do

do not decide this case on that ground. I decide it on this, that it either was no deed at all, until the sums were written in, and that then the jury were warranted in presuming a delivery to make it a deed; or, if it were a deed, it was delivered only to have operation from the time that those sums were written in, which were to give it all its effect. I think we must take it, from what passed at the time of the execution, it was not to be considered as having effect, till it could have its full effect, by all the sums being written in, that were to be written in. On these grounds I am of opinion that the rule should be discharged.

My Brother *Burrough* (a), who heard the argument, desired I should state he concurred in this opinion.

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GASELEE J. This case has been extremely well argued, and a great many authorities have been referred to which it is not necessary to go through at length. The authority that struck me the most as against the opinion of my Lord Chief Justice as now delivered, was the passage cited from *Buller*: — “If there be blanks left in an obligation in places material, and filled up afterwards by the assent of the parties, yet is the obligation void, for it is not the same contract that was sealed and delivered.” That is certainly borne out by the authority in *Roll’s Abr.* But I think the instance which he specifies is not borne out by the authority to which he refers. He goes on; — “as if a bond be made to C., with a blank left for his Christian name, and for his addition, which is afterwards filled up.” I should certainly have thought that the leaving the blank for the Christian name and the addition, imported of itself it was to be afterwards filled up: and I think that Mr. Justice *Buller’s* position is not warranted by the authority

(a) He was at chambers. *Park J.* was absent from ill health.

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to which he refers. Certainly this case does not range itself within the first part of the sentence, because, notwithstanding the degree of industry with which my Brother *Wilde* has cited cases, and the confidence with which he argued that the contract was altered, I cannot agree with him on that; it appears to me, from what was done in this case, that the contract was not altered. What was the object of the contract? The contract was to pay all that *Revett* was indebted to *Mills* and other creditors; that which was uncertain when the deed was first executed, or, rather, when the deed was originally sealed, was afterwards reduced to a certainty. And the way in which I consider that this deed is good is this,—that it was an imperfect execution, with an agreement at the time that it should take effect when the blanks were filled up. There was a meeting for that purpose, the sums at that time were agreed to, and it was filled up by *Brown*, who was adopted as the agent of both parties; and he took away the deed for the purpose of carrying it to other parties, by whom it was also to be executed. It is said the Defendant *Revett* never had himself the possession of this deed. No; but a deed may be delivered either by taking hold of the deed itself, or by words, or by acts. The permitting this person to take the deed away for the purpose of the other parties executing it, is of itself fit to be left to the jury, as a question whether or not that was not (if a redelivery should be held to be necessary) a redelivery on the mere insertion of the sums. On that ground I am of opinion this trust deed is to be considered as good.

With respect to the witness *Brown*, I should have great difficulty on the subject, taking it in the usual course, in saying that *Brown* would be a witness. He is a party to the deed, and he had, at the time of the trial, incurred expences, and the expences were to be paid according to the terms of the deed. But, considering it in the point
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of view in which my Lord Chief Justice has considered it, and in which I have known issues, directed by the Court of Chancery, treated, where the object was to satisfy the conscience of the Court; if, upon the whole, we see that justice has been done, there is no occasion to send it down to a new trial. Now, has justice been done here; and does it depend really and singly on the testimony of *Brown*? First of all, What is the probability? The probability of the case is, that it was left for future consideration. There are a great many blanks when the deed is carried to be executed the first day in the King's Bench; all the blanks are filled up, except *Mill's* debt; the probability is, that at that time *Mill's* debt was not ascertained: we have it from *Brown* it was done the next day. Does it rest on his evidence only? *Mr. Chapman* says, "I saw *Revett* afterwards, with the draft of the deed before him; he was reading: he told me he had executed it, and that he had got time:" therefore, the evidence of *Chapman* shews that what was done the second day of meeting was done with *Revett's* assent. But it does not rest there; it appears that *Revett* was cognizant of all he had done, and he expressly acts upon and confirms the deed; for he says, in a letter to *Moss*, a tenant, "Having this day executed to Mr. *Thomas Hudson*, of the firm of Messrs. *Harveys* and *Hudsons*, bankers at *Norwich*, a conveyance of all my estate and hereditaments, in trust, for the purpose of satisfying various charges and incumbrances, on the above property, I write to desire that you will in future pay your rents to the said *Thomas Hudson*, or his appointed receiver, whose receipt will be a sufficient discharge." That letter, therefore, shews the confirmation of the contract: it shews he was aware of what had been done, and I think satisfies the Court that the jury upon this occasion have done justice.

Rule discharged.

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In an action for a libel, it is no plea, that the Defendant had the libellous statement from another, and upon publication disclosed the author's name.

TO the ninth count of a declaration for libel, the Defendant, after pleading the general issue, pleaded, secondly, As to the publishing, and causing and procuring to be published, the following parts of the said supposed libel of and concerning the said Plaintiff, in the said ninth count of the said declaration mentioned, with the intent and meaning therein mentioned; to wit, "Mr. *De Crespigny* told Mr. *Wellesley* he was wrong in supposing he had spoken to his father, Sir *W. De Crespigny* (meaning the said Plaintiff): he had written a letter to him, and he had his (meaning the said Plaintiff's) answer, in which he admitted the fact; and that his wife, Mrs. *De Crespigny* and himself had the letter; that all the family knew of the circumstance (intimacy), that his poor brother *William*, who is dead, was extremely jealous of his father, (meaning the said Plaintiff), and had been turned out of his house; that his mother had told him that a child had been born, and that it had been her conclusion that his brother *Herbert* had spoken to his father (meaning to the said Plaintiff) upon the subject, who replied that he (meaning the said Plaintiff) entreated that so distressing a subject might not be again mentioned to him (meaning to the said Plaintiff): the Rev. Mr. *De Crespigny* told Mr. *Wellesley* he thought he was quite right not to allow his children to remain with people so infamously connected: Mr. *De Crespigny* informed Mr. *Wellesley* he had seen the Miss *Longs* yesterday at their house in *Berkshire*, and that he had directly accused Miss *Emma Long* with her intrigue, upon which she got so confused that she left the room in the greatest embarrassment; that he then

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then stated to Miss *Dora Long*, that Miss *Emma Long* had intrigued with his father (meaning with the said Plaintiff), and that Mr. *Wellesley* (meaning the said Defendant) intended to publish the whole story, unless they immediately gave up his children: Miss *Long* replied, that she had nothing to do with her sister's intrigue, and she must be responsible for her own conduct; but that no one would believe what Mr. *Wellesley* said: Mr. *De Crespigny* assured Mr. *Wellesley* that she never denied her sister's having committed the fault: Mr. *De Crespigny* told her his father had confessed it; (not denied it); to which she made no reply, but put herself into a violent passion, and said she did not wish to see any of Mr. *Wellesley's* friends within her house: — notwithstanding such declaration, she invited Mr. *De Crespigny* to dine with them, and to sleep at *Binfield House*: the above minutes were shewn to Capt. *De Brooke*, and on the part of the Rev. *H. C. De Crespigny* he admitted them twice to be correct, with the exception of one word, viz. that for *confessed it*, the words *not denied it* ought to be substituted:" the said Defendant, by leave of the Court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said Plaintiff ought not to have and maintain his aforesaid action thereof against him, because he says, that before the publishing of the said parts of the said supposed libel in the said ninth count of the said declaration mentioned, to wit, on the 5th day of *December*, in the year of our Lord 1827, at, &c. the said Rev. *H. C. De Crespigny* told the said Defendant that he was wrong in supposing that he the said *H. C. De Crespigny* had spoken to his father, Sir *W. De Crespigny*: he had written a letter to him, and that he had his (meaning the said Plaintiff's) answer, in which he (meaning the said Plaintiff) admitted the fact; and that his

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his (the said *H. C. De Crespigny's*) wife and himself had the letter; that all the family knew of the intimacy; that his poor brother *William*, who was dead, was extremely jealous of his father (meaning the said Plaintiff), and had been turned out of his house; that his brother *Herbert* had spoken to his father (meaning the said Plaintiff) upon the subject, who had replied, that he (meaning the said Plaintiff) entreated that so distressing a subject might not be again mentioned to him (meaning to the said Plaintiff): and the said *H. C. De Crespigny* then and there further told the said Defendant, he thought he was quite right not to allow his children to remain with people so infamously connected: And the said *H. C. De Crespigny* afterwards and before publishing the said libel in the introductory part of this plea mentioned, to wit, on, &c. at, &c. further told the said Defendant that he had seen the Misses *Long* yesterday at their house in *Berkshire*, and that he the said *H. C. De Crespigny* had directly accused Miss *Emma Long* with her intrigue, upon which she got so confused that she left the room in the greatest embarrassment; that he then stated to Miss *Dora Long*, that Miss *Emma Long* had intrigued with his father (meaning the said Plaintiff), and that Mr. *Wellesley* (meaning the said Defendant) intended to publish the whole story unless they immediately gave up his children. That Miss *Long* replied, she had nothing to do with her sister's intrigue, and that she must be responsible for her own conduct, but that no one would believe what Mr. *Wellesley* said; and the said *H. C. De Crespigny* assured the said Defendant that she never denied her sister's having committed the fault. Mr. *De Crespigny* told her his father had not denied it: to which she made no reply, and said she did not wish to see any of Mr. *Wellesley's* friends within her house: notwithstanding such declaration, she invited Mr. *De Crespigny* to dine with

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with them, and to sleep at *Binfield House*. And the said Defendant further said, that before the publishing the said parts of the said supposed libel in the introductory part of this plea mentioned, to wit, on, &c., at, &c., certain minutes and statements in writing were made as and for correct minutes and statements of the said communications and representations so made by the said *H. C. De Crespigny* as aforesaid, and the same were then and there revised and corrected by the said *H. C. De Crespigny*; and when so revised and corrected contained, and still do contain, the words and matter following, with the interlineations and alterations as follows: (here followed a statement of the minutes as revised and corrected by the Rev. *H. C. De Crespigny*. The expression *not denied*, was substituted for *confessed*; and the statement that his mother told him a child had been born, was erased; in other respects the minutes corresponded with the foregoing statement.)

And the said Defendant further said, that afterwards, and before the publishing of the said parts of the said supposed libel, in the said ninth count mentioned, to wit, on, &c., at, &c., the said *H. C. De Crespigny* caused the said minutes and statements, so revised and corrected by him as aforesaid, and containing the words and matter last aforesaid, to be delivered to him, the said Defendant, as and for a true and correct statement of the conversation he, the said *H. C. De Crespigny*, had had with the said Defendant as aforesaid; and the said minutes were theretofore, to wit, on, &c., at, &c., shewn to the said Captain *De Brooke*, in the presence of the said Colonel *Freemantle*, Mr. *Saville Lumley*, M. P., and Colonel *Pater*. And the said Defendant further said, that at the time of the publishing the said parts of the said supposed libel in the said ninth count and in the introductory part of this plea mentioned, as therein mentioned, he, the said Defendant, also published that the

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same had been so published to him by the said *H. C. De Crespigny*, therein mentioned as aforesaid; wherefore he, the said Defendant, at the said several times when, &c., in the said ninth count mentioned, did publish of and concerning the said Plaintiff the said several parts of the said supposed libel in that count mentioned, as he lawfully might for the cause aforesaid, and this he is ready to verify, &c.

To this plea there was a demurrer: and many causes of demurrer were specified and argued; but as the decision turned altogether on the general question, it is unnecessary to state the other points.


Wilde Serjt. in support of the demurrer. It is no justification of slander to say, that it is only the repetition of what has before been published by another; and, at all events, such a plea is no justification of a libel. A resolution in Lord *Northampton's* case (*a*) is the only authority which can be adduced in support of such a position. Lord *Coke* there says, "In an action for slander of a common person, if *J. S.* publish that he hath heard *J. N.* say, that *J. G.* was a traitor or thief, in an action on the case, if the truth be such, he may justify." But, first, the resolution is extrajudicial, and inconsistent with the decision in the case; — according to which several slanderers, who had vouched each other in succession, were punished in the star-chamber, notwithstanding such voucher; — and seems to have arisen from a misapplication of the law regarding false political rumours, which were made punishable by stat. 2 *R. 2. c. 5.*, 3 *Ed. 1. c. 34.*, and for the repression of which it was not necessary to punish any but the first propagator;

Secondly, the 12th part of Lord *Coke's* reports is a book of but questionable authority. *Holroyd J.* said, in *Lewis*

(*a*) 12 *Rep.* 134.

v. Walter (a), it "is not so accurate as the rest of the reports of Lord Coke, not having been published by him in his lifetime, but from his notes afterwards." And though some *dicta* may be found confirmatory of the resolution in Lord Northampton's case, and some cases in which it has been treated as authority, there is no accredited decision which establishes the point, but many the other way. *Crawford v. Middleton (b)*, — where the plaintiff having declared for slanderous words charging him with felony, said by the defendant to have been spoken of the plaintiff by a person whom the defendant met on the road, judgment was arrested by the opinion of three judges against *Twysden*, for want of an averment that nobody had said such words to the defendant, — is overruled by the decisions in *Gardner v. Atwater (c)*, and *Woolnoth v. Meadows (d)*; and in *Lewes v. Walter (e)* it was holden, that an averment in the declaration that the defendant had not heard the reports he propagated, was only necessary in cases on the statutes touching the propagators of political rumours.

It cannot be denied that the rule in Lord Northampton's case was, without investigation, assumed to be law in *Davis v. Lewis (f)*, and in *Woolnoth v. Meadows*. But if the rule be shewn to be destitute of authority, the decisions resting on it must fall to the ground; and in *Maitland v. Goldney (g)*, Lord Ellenborough held, that one who repeated slander, after knowing it to be unfounded, could not justify it by having named his author at the time. In *Gardner v. Atwater*, upon a motion in arrest of judgment, in an action upon the case for words spoken, it was held, that the plaintiff need not negative;

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(a) 4 B. & A. 614.

(b) 1 Lev. 82.


(c) Say. 265.

(d) 5 East, 463.

(e) Cro. Jac. 406. 413.

(f) 7 T. R. 17.

(g) 2 East, 426.

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in his declaration, the fact of the words having been spoken before by another. In *Lewis v. Walter* (a), *Holroyd* J. said, "The rule has been laid down too largely in the Earl of *Northampton's* case, and ought to be qualified, by confining it to cases where there is a fair and just reason for the repetition of the slander:" and *Best* J. said, "The reasons given by my Brother *Holroyd* shew that the fourth resolution in that case requires some qualification; for it cannot be justifiable to repeat slander under all circumstances, but only in those cases where it is done, not for the purpose of merely circulating the slander, but for some fair and reasonable cause." It would be most mischievous if a slander could be justified on the bare statement that it has been uttered by some other person; for, if so, a person, whose station and credit might give weight to a false report, might collude with one of no substance, against whom it would be in vain for the party injured to seek redress.


Thirdly, even admitting the resolution in Lord *Northampton's* case to be law, it applies only to the repetition of slander, and cannot be extended to libel. *Lewis v. Walter* is an express authority to this effect; and *McGregor v. Thwaites* (b) establishes the material distinction between libel and slander. Not only will an action lie for charges in writing, which would not lie for the same charges made orally, but the injury done by a publication in writing is infinitely more extensive and durable: it may be sent forth to the ends of the earth, and may endure as long as the material to which it is committed; while mere slander must speedily be forgotten.

Lastly, the plea is ill, even according to the law in Lord *Northampton's* case, for it does not give the Plaintiff any action over against the author of the slander:

(a) 4 B. & A. 615.

(b) 3 B. & C. 24.

Lady *De Crespigny*, one of the alleged authors, being dead; it being doubtful whether an action would lie against Mr. *Heaton De Crespigny*, the other author, inasmuch as his communication to the Defendant was confidential; and it being clear that such an action could not be sustained without the testimony of the Defendant, who would be an incompetent witness by reason of his interest in the verdict. The plea does not even allege that Mr. *H. de Crespigny* published the report; that it was published by the Defendant without malice; that it was true; or even that the Defendant believed it. Lord *Coke* himself admits, in Lord *Northampton's* case, "If *J. S.* publish that he hath heard generally, without a certain author, that *J. G.* was a traitor or thief, there an action *sur le case* lieth against *J. S.* for this, that he hath not given to the party grieved any cause of action against any but against himself who published the words, although that, in truth, he might hear them; for otherwise this might tend to a great slander of an innocent; for if one who hath *læsam phantasiam*, or who is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to report them generally, that he had heard scandalous words without mentioning of his author, that would give greater colour and probability that the words were true in respect of the credit of the reporter, than if the author himself should be mentioned, — for the reputation and good name of every man is dear and precious to him."

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Spankie Serjt. contra. Actions for slander and libel are founded on malice or falsehood, and it is sufficient that the plea negatives one or the other. It is *prima facie* a sufficient negation of malice, that the Defendant is not the author of the libel, and that he only repeats what he has been told: it is not to be assumed that the mere repetition is malicious, and the Defendant is not

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bound to negative malice by anticipation: if the repetition were the result of malice, the Plaintiff should allege that by way of reply. The resolution in Lord *Northampton's* case has always been taken as undisputed authority; was confirmed by Lord *Kenyon* in *Davis v. Lewis*, and is not now to be shaken by the crotchets of antiquaries. But the law of that resolution does not rest on Lord *Northampton's* case: that case was decided in 10 *Jac.* 1. But *Lewes v. Walter* (a), which was decided shortly afterwards, refers to *Dame Morrison v. Cade* (b), 5 *Jac.* 1., in which the declaration negatives that the Defendant had heard from any other the report he had circulated. *Maitland v. Goldney* may also be deemed an authority in support of the plea; for, by deciding that the Defendant was not justified in propagating, because he had heard it from others, a report which he knew to be false, the Court in a manner leave it to be inferred, that the having heard it would have been a sufficient justification for repeating it, if the Defendant had not known it to be false. In 1 *Roll. Abr.* 64. (C), the doctrine is laid down without qualification.

It is true, the resolution in Lord *Northampton's* case applies only to slander, but there is no substantial distinction between slander and libel, and the principles which are applicable to the one, are equally applicable to the other. If the Defendant received the report from a beggar, or one drunk or mad, or one that had *læsam phantasiam*, that would be matter for replication; but, *primâ facie*, he discharges himself of malice by pleading that he is not the author of the report.

The publication of the report by the first author is sufficiently averred in this plea, *Styles v. Nokes* (c); and the author is sufficiently designated to enable the plaintiff to sue him: it is not the Defendant's fault, if, from

(a) *Roll. Rep.* 444.(b) *Cro. Jac.* 162.(c) 7 *East*, 492.

technical

technical reasons, difficulties afterwards arise in the way of evidence.

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Wilde. The cases anterior to Lord *Northampton's* case, as well as the fourth resolution in that case, proceeded on a misapplication on the statutes respecting political rumours, which statutes were never directed against injuries arising from private slander. This is confirmed by the authority which has been referred to in *Rolle*, ending with these words, "*according to the law of news:*" that is, the law on those statutes touching public rumours.

It may be conceded that a plea in an action such as the present is sufficient if it negatives either the falsehood or the malice of the report: but it must negative them expressly; and these pleas do neither.

Cur. adv. vult.

BEST C. J. Great industry has been bestowed upon this case by my learned Brothers by whom it was argued; but no case has been cited, in which the principle, extrajudicially applied by the fourth resolution in Lord *Northampton's* case to oral slander, has been extended to libel. We might relieve ourselves from the difficulty of deciding this question, by saying that the technical objections taken to the pleas by the demurrer are sufficient to entitle the Plaintiff to judgment. But we think it more proper for us to pronounce our judgment on the principal question raised by these pleadings, namely, Whether a man who receives from the hands of another a libel on any person, is justified in publishing that libel, provided that in his publication the name of the person from whom he received it is mentioned? We do not hesitate to say, that even if we were to admit, what we beg not to be considered as admitting, that in oral slander, when a man at the time of his speaking

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the words names the person who told him what he relates, he may plead to an action brought against him, that the person whom he names did tell him what he related, — such a justification cannot be pleaded to an action for the republication of the libel.

If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the journals, and thus circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons, and if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove.

The reason which Lord *Coke* gives, why in the case of oral slander you should name the author, proves that you must not be allowed to publish written calumny: he says, that unless you mention the name of the author, it might be a great slander of an innocent; “for if one who has *læsam phantasiam*, or is a drunkard, or of no estimation, speaks scandalous words, if it shall be lawful for a man of credit to report generally that he had heard scandalous words without mentioning his author, that would give greater colour and probability that the words were true in respect of the credit of the reporter than if the author were mentioned, for the

the reputation of every good man is dear and precious to him." Of what use is it to send the name of the author with a libel that is to pass into a country where he is entirely unknown: the name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity or not; whether his statement was made in earnest or by way of joke; whether it contains a charge made by a man of sound mind or the delusion of a lunatic. There is no allegation, in this case, that the Defendant believed this statement; on the contrary, it is to be observed, that Mr. *De Crespigny* struck out a very material part of the statement, and yet the Defendant published it, although he must have known that it was not correct. I allude to that part in which the Defendant makes Mr. *De Crespigny* say, that his mother had told him that a child had been born. Although he tells you in his plea that *De Crespigny* had erased those words, yet he justifies the publishing of them. The declarations of a son and dying wife are made the means of blasting the character of a father and husband. If, without any allegation that its contents were true, or that the publisher had any reason to believe them to be true, we were to hold that these pleas were a justification, we should establish a mode by which men might indulge themselves in ruining the characters of any persons they might be disposed to calumniate; there will be no difficulty in getting wretches, who would be better off within the walls of a prison than they are without, to furnish such as will pay for them with any statements they may desire respecting the character of any person whatsoever.

Written communications are often made for the information of those to whom they are given, and for their information only. Such communications contain facts necessary to be known by those to whom they are made,

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made, but not fit to be divulged to the whole world. It may be important to the interest of the members of a family to know of things which have taken place in their family, and which having been disclosed with a due regard to the interest of the person to whom the disclosure was made, although injurious to some other person's character, would not be libellous. Can it be permitted that persons possessing such communications should publish them to the world if they only give the names of those by whom they were made? Such a doctrine might furnish amusement for the lovers of scandal, but it would cause much misery in many families. It is a principle of our law, that whoever wilfully assists in the doing an unlawful act, becomes answerable for all the consequences of such act: what reason is there to except the circulation of slander out of this rule? He who prints and publishes what was given to him in manuscript, has to answer for by far the greatest part of the mischief that the statement has occasioned. But it has been said at the bar that these pleas are *primá facie* answers, and that the circumstances that are to shew that the publication was not honestly made are to come from the Plaintiff in his replication, or to be proved under the general replication *de injuriá*. The Defendant ought to know the state of the author, and the circumstances in which he wrote the libel. The Plaintiff may be ignorant of those circumstances: the law requires that facts should be proved by those who ought to have the means of knowing them, and not by those who must be presumed ignorant of them. But these pleas do not present a *primá facie* defence. They offer nothing which requires an answer. Because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be justified, or even excused, by wrong. If a man receives a letter with authority from the author to publish

publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in the newspapers. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander. This seems to be a case of the latter description: but, if published either with or without the authority of the writer, it can never be a justification, nor can the previous publication be set up in mitigation of damages, without proof that the author believed it true, and had some reasonable cause for publishing it. We are not to endure a reproach against our neighbour. What, then, is our moral duty, if we hear any thing injurious to the character of another? If what we have been told does not concern the public or the administration of justice, we are to lock it up for ever in our own breasts. We are on no account to report it to gratify our enmity to any particular person, or, for that more common cause of slander, to gratify the malice that exists by a desire to raise ourselves above, or to keep ourselves upon an equality with our neighbours by injuring their characters.

The statements published relative to the Plaintiff do not concern the public; they are not disclosed in the course of the administration of justice; nor does it appear from the pleadings that the Defendant, in making this virulent attack on the Plaintiff, has the excuse that he published this paper in his own defence: but before he used this statement in any manner, he was bound to satisfy himself that it was true; and he does not even say that he believed it. Before he gave it general notoriety by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the Plaintiff, without

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out being able to prove the truth of the charge that he had made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter. We are warranted in saying that the Defendant has made a very serious charge against the character of the Plaintiff without being prepared to make it good; for if he could have proved that what he published was true, he might have put the truth of the statement on the record as his justification.

Judgment for the Plaintiff.

Feb. 10.

CHARLES CARTER v. ROBERT CARTER and Others.

1. A payment of ground-rent by the occupier, in default of the mesne tenant, is not the less a compulsory payment, because the ground-landlord on demanding it allows the occupier time to pay.

CASE for wrongfully distraining for 25*l.*, when only 5*l.* 10*s.* was due. There were also counts for an excessive distress, a wrongful distress, and a count in trover.

At the trial before *Best C. J.*, *Middlesex* sittings, after *Michaelmas* term, the facts were as follows:—

The Plaintiff rented a house of the Defendant *Carter* at 50*l.* a year. Shortly after he had paid his half-year's rent, due *Lady-day* 1827, the ground landlord's steward called on him for 8*l.* 10*s.* ground-rent, due the *Christmas*

2. *Growing* rent may be discharged by such payments as well as rent actually due.

3. Where growing rent has been reduced by payments of land-tax, &c. if the landlord distrains for the whole sum reserved, the tenant may properly sue in case.

preceding,


preceding, and 8*l.* 10*s.* due at *Michaelmas* preceding. The Plaintiff complained of the hardship of such a demand just after he had paid the rent of his immediate landlord, and prayed for time. The steward gave him time. 8*l.* 10*s.* was paid in the following *July*, and 8*l.* 10*s.* in *September*. The steward stated that he never called on the occupier for the ground-rent, unless default had been made by the immediate lessee, which was the case in the present instance.

In *September* 1827, the Plaintiff, being called on to do so, also paid 2*l.* 10*s.* for land-tax, due at *Michaelmas* 1826, and *Lady-day* and *Michaelmas* 1827.

In *November* following, the Defendant, *Carter*, demanded of the Plaintiff 25*l.* for half a year's rent alleged to be due the preceding *Michaelmas*. The Plaintiff tendered him in discharge 5*l.* 10*s.*, and the receipts for the ground-rent and land-tax as above.

This the Defendant refused to accept, and distrained for the whole 25*l.*

On the part of the Defendant, it was objected that the action was improperly conceived; that none of the counts in the declaration were adapted to the Plaintiff's case; and that if any wrong had been done to the Plaintiff, his remedy was not case, but replevin, in which, to an avowry for the rent, he might have pleaded the payment of the ground-rent, &c.; *Sapsford v. Fletcher (a)*, *Taylor v. Zamira (b)*; that the Defendant, however, was entitled to distrain for the whole rent due at *Michaelmas*: no set-off being permitted in cases of distress, *Andrew v. Hancock (c)*, the distress could not be answered by any thing but payment; and payment could only be of a debt due: the discharge of the ground-rent, therefore, by the Plaintiff could not operate as payment of the

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(a) 4 *T. R.* 511.

(b) 6 *Taunt.* 524.

(c) 1 *B. & B.* 37.

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rack-rent, because at the time the ground-rent was discharged, the rack-rent in question was not due.

At all events no payment would go in discharge of rack-rent, but a payment by compulsion; and here the Plaintiff could not be said to have paid upon compulsion, when the ground landlord's steward allowed him time to pay at his convenience.

A verdict having been found for the Plaintiff,

Wilde Serjt. obtained a rule *nisi* to set it aside upon the foregoing objections.

Andrews Serjt. shewed cause. The action is properly conceived in case, for replevin only lies where *no* rent is due, and in the present instance the Plaintiff has no remedy if he cannot sue in case. And the payment of ground-rent and land-tax may operate as payment of rack-rent growing due, as well as of rack-rent actually due. In *Stubbs v. Parsons* (a) *Bayley* J. said, "the law considers the payment of the land-tax as a payment of so much of the rent then due, or *growing due*, to the landlord."

The circumstance that the ground landlord allowed the Plaintiff time to pay the ground-rent, after it was demanded, does not render it the less a compulsory payment. The Defendant had failed to pay it, and the Plaintiff, notwithstanding the indulgence granted him, paid under a liability to distress.

Bompas Serjt. (for *Wilde*) relied on the objections urged at the trial.

BEST C. J. The great stand made at the trial, on the part of the Defendant, was, that this payment by the Plaintiff was a voluntary payment. I thought then,

(a) 3 B. & A. 516.

and

and am still of the same opinion, that it was not a voluntary payment. The Plaintiff was liable to be distrained on for ground-rent. Having just paid his rack-rent, he prayed for time to pay the ground-rent. Six weeks were allowed, at the end of which time it was paid; but the Defendant knew he was liable to distress, though not actually distrained on; and a payment under such circumstances is no more voluntary, than a donation to a beggar who presents a pistol. In *Sapsford v. Fletcher*, and *Taylor v. Zamira*, the payment of ground-rent by the occupier for the landlord, was holden not to constitute a cross demand, but to amount to payment of so much of the occupier's rent. Here, by the same means, all the Plaintiff's rent had been paid but 5*l.* 10*s.*, notwithstanding which the Defendant distrains for 25*l.*; he is, therefore, clearly liable on the count which states the excessive distress in that way. The substantial question here is, Was more than 5*l.* 10*s.* due to the Defendant? for that had been offered, and the jury find that that was all he was entitled to. Several of the counts are applicable; and if the whole distress were wrongful, the count in trover is of itself sufficient, as was established in *Branscomb v. Bridges*. (a)

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PARK J. It is quite clear this was not a voluntary payment. The Plaintiff was all along liable to a distress by the ground landlord, and if time had not been given, would have been distrained on.

Then, it has been expressly decided in *Sapsford v. Fletcher*, and *Taylor v. Zamira*, that the occupier is entitled to deduct from his own rent, payments so made. But it has been argued that he cannot deduct, from rent growing due, payments for the ground-rent of an antecedent half year, and *Andrews v. Hancock* has been

(a) 1 B. & C. 145.

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referred to. But in that case the occupier for several years, subsequently to paying the ground-rents, made an entire payment of his own rent, and then sought to deduct the ground-rents so paid, from a subsequent year's rent. Here the Plaintiff seeks to make the deduction from the first payment of rent accruing due after the ground-rent had been demanded and paid. It would be most unjust to refuse this, and the rule which has been obtained must be

Discharged.

BURROUGH J. and GASELEE J. were absent.

Feb. 11.

BRIDGES v. SMYTH.

A landlord having treated an occupier of his land as a trespasser, by serving him with an ejectment, cannot afterwards distrain on him for rent, although the ejectment is directed against the claim of a third person, who comes in and defends in lieu of the occupier, and the occupier is aware of that circumstance, and is never turned out of possession.

REPLEVIN. Avowry for thirteen and a half-years' rent, alleged to be due at *Lady-day* 1827, on a demise at 382*l.* a year, payable half-yearly.

Pleas *non tenuit, riens en arriere*, and eviction in *September* 1823, and issue thereon.

At the trial before *Holroyd J.* last *Suffolk* assizes, it appeared that at *Michaelmas* 1807, *Sir Harvey Smyth* demised the premises to Plaintiff for ten years, at a rent of 382*l.* a year. A part of them was copyhold.

He died in 1811, when the property descended to *Mrs. Brandt*, who died in *February* 1814, and devised it to Defendant for her life.

The Defendant refused the property as devisee, thinking she had a title as heir; but as she delayed to take any steps in the business, the lady of the manor seized

the

the copyhold part of the premises on the Defendant's neglect to be admitted, and after obtaining judgment in an ejectment, received the rent of that part, amounting, from 1815 to 1820, to 200*l.* a year, and afterwards to 170*l.*

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In 1823, Sir *G. H. Smyth*, the real heir at law of Mrs. *Brandt*, encouraged by the Defendant's neglect, brought an ejectment against the Plaintiff, and sued out a writ of possession thereon in *January* 1824. The Plaintiff, however, was suffered to remain on the premises.

The Defendant, thereupon, in *February* 1824, with a view to defeat Sir *G. H. Smyth's* claim to the property, and after consulting with the Plaintiff on the subject, brought an ejectment against the Plaintiff, the demise in which was laid *March* 2, 1814. By the consent rule Sir *G. H. Smyth* came in and defended as landlord; and the Defendant having by means of her title as devisee recovered in the action (a), a writ of possession was made out for her in 1827, but was not executed, as she refused to pay the sheriff's poundage. She had been admitted to the copyhold part in 1825. The Plaintiff was never actually out of the possession of the premises; but the Defendant had notice of all the foregoing proceedings. Nothing was proved amounting to an admission by the Plaintiff that she held under a demise at 382*l.* a year.

It was objected at the trial, that whatever claim the Defendant might have against the Plaintiff in an action of trespass for *mesne profits*, she had no right, under the above circumstances, to distrain; and the learned Judge being of this opinion, a verdict was taken for the Plaintiff, with leave for the Defendant to move to enter a verdict for such sums as the Court should think the Defendant entitled to.

(a) See *Doe d. Smyth v. Smyth*, 6 B. & C. 112.

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Wilde Serjt. having obtained a rule nisi accordingly,

Storks Serjt., who shewed cause, contended that at the time of the distress, there was no demise subsisting on which the Defendant could avow for rent. The demise from Sir *H. Smyth* had expired in 1817, and so far was the Plaintiff from occupying under a tenancy continuing from that demise, that the Defendant had, by her demise in the ejectment, treated her as a trespasser from the 2d of *March* 1814. *Russell* Serjt. was to have followed on the same side, but the Court called on

Wilde to support his rule. The Plaintiff never having been turned out of possession, there has been no determination of her tenancy; and as she never objected to the terms of the lease which expired in 1817, it must be inferred she continued to hold on the same terms. The ejectment by Sir *G. H. Smyth* does not affect the Defendant's right; that was a proceeding by a wrong-doer without title, for which the Defendant is in no way responsible; and in the ejectment by the Defendant, the Plaintiff's name was only inserted for form, the party really concerned being Sir *G. H. Smyth*. It was not an adverse proceeding against the Plaintiff, as appears by the Defendant's refusing to execute a writ of possession. There is no evidence, therefore, to support the plea of eviction. As to the proceeding by the lady of the manor, it was never carried to the length of an ouster; it does not appear that the Plaintiff ever communicated it to the Defendant; and the Defendant was subsequently admitted to the copyhold part of the property; so that, at the time of the distress, the Plaintiff was tenant to her of the whole; and the terms under which she occupied from 1807 to 1817 having never been objected to, it may be presumed she consented to continue on the same terms.

But

But *the Court* were clearly of opinion, that whatever other remedy might be open to the Defendant, she could not distrain as upon a contract between lessor and lessee, after treating the Plaintiff as a trespasser since 1814 by the demise in the ejectment of 1824; and that the circumstance of that ejectment having been directed against the claim of Sir *G. H. Smyth* made no difference in the case, judgment having been entered up against the casual ejector, which would be conclusive against the tenant.

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Rule discharged.

VERE and Others v. CARDEN.

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THE Plaintiffs declared on two bills of exchange, due the 5th and 6th of *December* 1828.

A plea false
 on the face of
 it may be
 treated as a
 nullity.

The Defendant pleaded a judgment recovered on the same bills in the *Michaelmas* term preceding.

The Plaintiff having treated this plea as a nullity, and signed judgment, the plea being false on the face of it,

Andrews Serjt. obtained a rule *nisi* to set aside the judgment.

Wilde Serjt., for the Plaintiffs, relied on *Lamb* v. *Pratt* (a), and

The Court after hearing *Andrews*, discharged the rule with costs.

(a) 1 D. & R. 577.

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BRYANT v. Sir JOHN PERRING.

A defendant may plead matter *puis darrein continuance*, notwithstanding an order to rejoin issuably.

THE Defendant had pleaded a release. The Plaintiff replied that the release was conditional on the Defendant's doing certain things to the satisfaction of *A.* and *B.*, and alleged non-fulfilment of the condition. On the first day of term, he ruled Defendant to rejoin by the 26th of *January*.

On the 26th, the Defendant obtained, under a Judge's order, three days further time to rejoin, upon the terms of rejoining issuably, and taking short notice of trial for the last sittings in term.

On the 29th, *A.* and *B.* gave a certificate of the Defendant's having performed to their satisfaction the things required, and this certificate the Defendant that evening pleaded *puis darrein continuance*.

The Plaintiff thereupon signed judgment, on the ground that the Defendant had not rejoined issuably within the time limited.

Russell Serjt. having obtained a rule *nisi* to set aside this judgment as irregular,

Jones Serjt. who shewed cause, contended, that the judgment was regular, the Defendant having wholly neglected the terms of the Judge's order; that a plea *puis darrein continuance* was no rejoinder at all, much less an issuable rejoinder; that such a plea is treated with the same strictness as a plea in abatement; *Martin v. Wyvill* (a); and that a plea in abatement is not a compliance with an order to plead issuably; *Kilwick v.*

(a) 1 Str. 494.

Maidman (a), Wagstaffe v. Long (b); and he likened the case to that of executors, who are never allowed time to rejoin, except on condition that they shall not confess any new judgments. But

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The Court held that this was a matter altogether independent of the Judge's order, insomuch that even had the Defendant rejoined issuably, he might afterwards, upon apt occasion, plead *puis darrein continuance*.

Rule absolute.

(a) 1 Burr. 59.

(b) Barnes, 263.

STEWART v. WILLIAMSON.

Feb. 12.

THE Plaintiff having claims against the Defendant for the hire of a ship under a charter-party, which claims the Defendant disputed, the matters in difference were referred to two arbitrators and an umpire, and the reference was made a rule of Court; the parties having executed bonds to abide by the award, in the penalty of 3000*l*.

On the 26th of *April*, some days after the parties had concluded their respective cases, the Plaintiff revoked his authority to the arbitrators, and went to reside in *Scotland*, notwithstanding which, on the 28th of *April*, one of the arbitrators and the umpire made an award, in which they found that nothing was due from the

Where a party to an arbitration under a rule of court revoked the arbitrators' authority upon discovering improper conduct, and then having sued for, and recovered by action, damages for the matter in dispute, went to reside in *Scotland*, the Court re-

fused to stay execution upon the application of the adverse party, who proposed thereby to compel him to appear to an action on the arbitration-bond, the arbitrator having awarded against him, notwithstanding the revocation of authority.

F f 3

Defendant

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Defendant to the Plaintiff, and ordered the Plaintiff to pay half the costs of the arbitration.

The Plaintiff then commenced an action on the charter-party in this Court, and at the sittings after last term obtained a verdict for 1500*l.*, which the Defendant was unable to set aside.

The Plaintiff having now sued out execution,


Taddy Serjt., upon an affidavit stating the foregoing facts, and also that in the present term an action had been commenced against the Plaintiff on the arbitration-bond, but that it was impossible to serve him with process, because he resided in *Scotland* for the avowed purpose of eluding it, obtained a rule *nisi*, upon paying into Court the monies recovered, to stay the proceedings in the execution till the further order of the Court; proposing thereby to compel the Plaintiff to appear to the action on the arbitration-bond.

Wilde Serjt. shewed cause, upon an affidavit which stated that the Plaintiff had revoked his submission in consequence of the corrupt conduct of one of the arbitrators, and specified many improper acts, savouring of bribery.

Taddy and *Spankie* Serjts. in support of the rule, endeavoured to explain the arbitrators' conduct, but the facts were too strong. They contended, however, that it was a contempt of the rule of Court for the Plaintiff to revoke his submission, and that instead of doing so he should have brought forward the facts on which he relied, as an answer to an application for an attachment, or have applied to the Court under the statute of *William*.

BEST

BEST C. J. I do not think it a contempt to revoke an order of reference, when the arbitrator has indirectly taken a bribe. As to the remedy for corruption in an arbitrator under the statute of *William*, that does not deprive the party of the power of rendering it unnecessary, by revoking the order in the first instance. The rule must be discharged.

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PARK J. This is an application of some novelty, amounting in effect to a special *distringas*, and calling on us to levy issues to the amount of 1500*l.*; that is, to tie it up in the hands of the officer of the Court until the party applied against shall enter his appearance.

If he had withdrawn from the process of the Court there might perhaps have been some colour for the application; but here he has been residing in *Scotland* for some time, and if the parties applying thought the revocation wrong, they should have sued on the bond at once, and not have lain by for two years. It is a most singular argument to say that the party is to go on with the arbitration after the arbitrator has received money from the other side, because he may afterwards obtain redress on the statute of *William*.

There is no colour for this application.

BOROUGH J. and GASELEE J. agreed that there was no ground for the application, and the rule was discharged.

Rule discharged accordingly.

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BOUSFIELD and Another v. GODFREY.

Where Defendant surreptitiously obtained possession of an unstamped agreement executed by himself and the Plaintiff (thereby preventing the Plaintiff from affixing a stamp as he had intended, in twenty-one days after execution), and then swore that he had lost the agreement, the Court ordered that he should produce a copy in his possession to the Plaintiff, and that if the Plaintiff produced that copy stamped at the trial, the Defendant should be precluded from producing the original.


THIS was an action upon an agreement executed by the Defendant and the Plaintiffs.

A Judge at chambers having made an order that the Defendant should produce the original agreement to the Plaintiffs' attorney, in order that it might be stamped at the expense of the Plaintiffs, and should deliver a copy of it to them; and that in default of such production the Defendant's attorney should deliver to the Plaintiffs' attorney a copy of a copy of the agreement, which the Defendant's attorney admitted to be in his possession; and that upon such copy of the copy being read in evidence at the trial, the Defendant should be precluded from producing the original,

Cross Serjt. moved for a rule *nisi* to discharge this order, upon an affidavit of the Defendant, in which he deposed, among other things, that the agreement in question had never been stamped; that upon the occasion of a change of residence, he believed he had lost or burnt it; that he had no knowledge whatever where it now was, and that he had never seen it since February 1828.

Cross contended that compliance with the order as to the original agreement was impossible, and that it ought not to be required if possible, because by compliance the Defendant would subject himself to the penalties imposed by 9 & 10 *W. & M. c. 25. s. 59.* and 23 *G. 3. c. 58.*, for executing agreements unstamped. Then, if the unstamped original were lost, or even wrongfully destroyed

destroyed by one of the parties, a copy could not be received in evidence. *Rippiner v. Wright.* (a) A rule *nisi* having been granted,

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Wilde Serjt. shewed cause, upon affidavits which stated that the Plaintiffs intended to have had the agreement stamped within the time allowed by law; that at the Defendant's request it was arranged that the agreement should be placed in the hands of *Rogers*, a mutual friend of all parties; that the Defendant, however, prevailed on *Rogers* to allow him to take it home under pretence of making a copy, and that they had never since been able to get it out of his hands. Letters and admissions of the Defendant were then deposed to, which shewed clearly that the agreement was in existence, and in his hands, as late as *August* 1828; and it was upon this evidence that the Judge's order had been issued. *Wilde* contended that the penalties imposed by the earlier statutes had been virtually repealed by the 55 G. 3. c. 184., which enables a party to stamp an agreement within twenty-one days after execution, as the Plaintiffs would have done in this case if not prevented by the Defendant; which distinguished the case from *Rippiner v. Wright*. *Bateman v. Phillips* (b), *Morrow v. Saunders* (c), and *Cooke v. Tanswell* (d), were express authorities in favour of the application.

Cross asserted that the original could not now be found; that the stamp-office would not stamp a copy; and that the interests of the revenue required that evidence of the agreement should not be given without a stamp. He relied on *Rippiner v. Wright*.

(a) 2 B. & A. 478.

(b) 4 Taunt. 157.

(c) 1 B. & B. 318.

(d) 1 B. M. 465.

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BEST C. J. It is impossible to doubt that the agreement is in existence, for the Defendant's affidavit is contradicted by his own letters. And according to his own statement, he fraudulently prevailed on *Rogers* to allow him to take it home, while the Plaintiff expressly swears that he meant to have it stamped. I feel no difficulty, therefore, in ordering the Defendant to produce it, if he has it; and if not, to produce the copy, to be taken to the stamp-office. If the office think fit to stamp the copy it may be produced at the trial, and the Defendant shall be precluded from producing the original to defeat it.

This will in nowise injure the revenue, and does not impeach the case of *Rippiner v. Wright*. But the stamp-office is not to be made an engine to assist the Defendant in his own iniquity.

We should not have decided thus if the stamp ought to have been on the instrument at the time of execution. But no offence was committed at that time, because the parties have twenty-one days to affix the stamp. If there were any offence it was the Defendant's, because he, having retained the agreement, ought to have stamped it; and he is not to be permitted to take advantage of his own wrong.

The rest of the Court concurring, the copy was handed over to the Plaintiff's attorney in court; and it was then ordered that

If the Plaintiff should upon the trial of the cause produce the copy of the agreement that day delivered over in court, duly stamped, the Defendant should not be permitted at the trial to produce the original agreement.

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DOE dem. FISHER v. GILES and Others.

Feb. 12.

EJECTMENT. At the trial before *Vaughan B.*, Where the mortgagor remains in possession, and the money is not repaid on the day stipulated, the mortgagee, who has a power of entry and sale on non-payment, may eject the mortgagor without notice to quit, or demand of possession.

Shropshire Summer assizes 1828, it appeared that by a mortgage deed bearing date 19th *February* 1827, the Defendant, *Giles*, conveyed the property in question to *Fisher*, with a power to enter and sell it absolutely in case 6200*l.* borrowed on the security of the property should not be paid with interest on the 19th of *August* 1827.

The money not having been paid, *Fisher* commenced this action, and laid the demise on the 24th of *September* 1827, up to which day no interest was paid.

No notice to quit was given, nor any demand of possession ever made.

Thereupon it was objected, that a mortgagor in possession is a tenant to the mortgagee; *Partridge v. Bere* (a); and, if only a tenant at will, cannot be treated as a trespasser without a previous determination of the mortgagee's will by a demand of possession. A verdict was taken for the lessor of the Plaintiff, with leave for the Defendants to move to set it aside and enter a nonsuit.

Cross Serjt. having obtained a rule *nisi* on the authority of *Partridge v. Bere*,

Russell Serjt. shewed cause.

A mortgagor in possession has no such interest as to entitle him to a notice to quit or even a demand of possession, upon a forfeiture of his estate by nonpayment of the mortgage money at the day agreed on.

(a) 5 B. & A. 604.

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The contract into which he has entered has fully apprised him that if the money be not paid, the property is instantly to pass over to the mortgagee, and it would be as unreasonable to require that he should receive formal notice of his own default (for a demand of possession would amount to no more), as to require for a lessee under a seven years' lease, half a year's notice to quit previous to the expiration of the seven years. But in *Keech v. Hall* (a), it is expressly laid down that the mortgagee may, without notice, eject a tenant of the mortgagor let into possession after the mortgage; and in *Moss v. Gallimore* (b), Lord Mansfield says, "A mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only *quodam modo*. Nothing is more apt to confound than a *simile*. When the court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will." And in *Birch v. Wright* (c), Buller J. says, "That a mortgagor has often been called a tenant at will to the mortgagee in courts of law and equity, is undoubtedly true; but I think inaccurately so; and the expression has been used when it was not very material to ascertain what his powers or interest were, or to settle with any great precision in what respects he did, and in what respects he did not, resemble a tenant at will. In old cases he is sometimes called a tenant at will, and sometimes tenant at sufferance. In *Keech v. Hall*, Wallace called him the agent of the mortgagee, and Lord Mansfield stated him to be tenant at will to some purpose, but not to others. In *Moss v. Gallimore*, Lord Mansfield said, 'A mortgagor is not in reality a tenant to the mortgagee; if he were, he must pay rent, but that is not so. To many purposes he is like a tenant at will, but he does not pay rent, he must pay interest only.' But

(a) *Dougl.* 21.(b) *Ibid.* 282.(c) 1 *T. R.* 382.

if a likeness must be found, I think, as it was put by *Ashhurst J.* in *Moss v. Gallimore*, a mortgagor is as much if not more like a receiver than a tenant at will: in truth he is not either. He is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee, I mean in ejectments brought for the recovery of mortgaged lands. If he were tenant at will, the demise could not be laid on a day antecedent to the determination of the will. But it is every day's practice to lay the demise on a day long before there has been any actual determination of the will, some time back to the time when the mortgage became forfeited, and no objection has ever been made on that account."

And the decision in *Partridge v. Bere* has not altered the law; for, as *Buller J.* said in *Moss v. Gallimore*, "Expressions used in particular cases are to be understood with reference to the subject-matter then before the Court;" and in *Partridge v. Bere* the Court said, that a mortgagor in possession was tenant to the mortgagee, not for the purpose of laying down the respective rights of those two parties, but merely to prevent justice being defeated in a claim against a third party by an immaterial variance in the declaration. The Plaintiff, there, declaring against the Defendant for an injury to his reversion, had alleged that the property injured was in the possession of one *Turner* as his *tenant*: it turned out that the Plaintiff had become entitled to the reversion under a *mortgage* from *Turner*, who remained in occupation: under those circumstances the Court might fairly decide that, as against a wrongdoer, *Turner* might be called tenant to the Plaintiff, without deciding that, as against the Plaintiff, *Turner* had any such interest as would entitle him to a notice to quit,

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quit, or even demand of possession. It was sufficient to satisfy the declaration if he were tenant by sufferance.

Cross. The mortgagor, when permitted by the mortgagee to remain in possession, becomes thereby his tenant at will, and as such entitled, before an ejectment is brought, to be informed of the determination of the mortgagor's will by a demand of possession. To deny him this, would operate with great hardship and injustice; because the mortgagee, by allowing him to remain in possession, impliedly rescinds the strict letter of the contract, and encourages him to sow in the fair expectation that he shall reap. If he be tenant at will, Lord Coke says, "The lessor may, by actual entry into the ground, determine his will in the absence of the lessee, but by words spoken from the ground the will is not determined, until the lessee hath notice." (a) In *Keech v. Hall*, *Thunder v. Belcher* (b), and other cases which have decided that the mortgagee may eject without notice to quit, the mortgagor was not the person in possession, but some person claiming under him, and, by that circumstance alone, the mortgagor had himself determined the will. But in *Prowseley v. Blackman* (c), in order to support an ejectment against the heir of the mortgagor, the mortgagee entered before the ejectment.

In *Smartle v. Williams* (d), Holt C.J. says, "Upon executing the deed of mortgage, the mortgagor, by covenanting to enjoy till default of payment, is tenant at will." In *Moss v. Gallimore*, Ashhurst J. said, "Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered if there is an under-tenant, for there can

(a) *Co. Lit.* 55 b.(b) 3 *East*, 449.(c) *Cro. Jac.* 659.(d) 1 *Salk.* 245.

be no such thing as an under-tenant to a tenant at will. The demise itself would be a determination of the will." And from what fell from *Buller J.* in *Birch v. Wright*, it may be collected, that what he laid down with respect to the mortgagor's interest, was not meant to apply to cases where he is left in possession by the mortgagee; for he says, "Mr. J. *Ashhurst* said, in some respects a mortgagee is strictly tenant at will, — but that is not so *here*, for the mortgagor is *not* in possession."

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Then, *Partridge v. Bere* is an express and a recent decision that the relation of landlord and tenant subsists between the mortgagee and the mortgagor in possession, and even on a tenancy at will the will must be determined in some way, before an ejectment can be brought: *Goodtitle v. Herbert.* (a)

Cur. adv. vult.

BEST C. J. This was an action of ejectment, brought by a mortgagee against a mortgagor. By the mortgage-deed, if the principal sum remained unpaid on a given day, it was covenanted that the mortgagee might enter, and if not paid within thirty days from the day fixed for its payment, he was at liberty to proceed to a sale of the estate without the concurrence of the mortgagor.

This action was brought two days after the day on which the mortgagee had a right to re-enter for non-payment, and before any interest had been paid on the money lent. It was insisted at the trial that an ejectment could not be brought until the mortgagee had required the mortgagor to deliver up possession of the estate.

My Brother *Vaughan*, who tried the cause, reserved, for the consideration of the Court, the question, Whether

(a) 4 T. R. 680.

this

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this action could be maintained without a demand of the possession of the estate previous to the service of an ejectment?

It has never yet been decided that it is incumbent on a mortgagee to make such a demand previous to the commencement of an action of ejectment against the mortgagor. In *Partridge v. Bere*, which was an action brought by the plaintiff for an injury to his reversion, the Court thought that a mortgagee might describe himself as a reversioner, the mortgagor being in possession of the estate, and said that he was a tenant within the strictest definition of the word. This case comes nearer to the present than any I have been able to find.

But this was not a case between the mortgagee and the mortgagor in which the Courts were called upon to decide what are the rights of the one against the other. The defendant in that case was a wrongdoer, and had, therefore, no right to object to the plaintiff calling himself a reversioner as long as he permitted the mortgagor to be in possession of the land.

It has been argued that the mortgagor is tenant at will to the mortgagee; and, therefore, the latter can maintain no action against the former till that tenancy is determined. Lord *Mansfield*, in the case of *Moss v. Gallimore*, said, “*That a mortgagor was not properly a tenant at will to the mortgagee, for he is not to pay him rent.*” In *Birch v. Wright* Mr. Justice *Buller* says, “*A mortgagor is not considered as a tenant at will in those proceedings which are in daily use between a mortgagor and a mortgagee; I mean in ejectments brought for the recovery of mortgaged lands.*”

This opinion of Mr. Justice *Buller* is directly to the point now in question. The words of Lord *Mansfield*, “he is not to pay him rent,” are very important. The payment of rent countenances a right to the possession of the land; the payment of interest does not; it relates
to

to the debt, and not to the property pledged. A landlord is not, by taking rent, to induce a man to sow the land, and then turn him out before he can take the crop; and, therefore, a tenant at will has emblements, or may take the crop for his own use. *Co. Lit.* 55. b. Lord *Mansfield* says, in *Keech v. Hall*, "A mortgagor is not entitled to reap the crop as other tenants at will are, because all is liable to the debt." A mortgagor resembles a person who has executed a statute or recognisance. Whatever these persons do to give value to the property under pledge, is done for the benefit of the creditor.

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In *Bardens and Withington's case* (a), *A.* is bound in a statute to *B.*, and sows the land; *B.* extends the lands, which are delivered to him in execution. It was adjudged, that the conusee shall have the corn sown. The same law in the case of a recognizance.

If the mortgagor is not a tenant at will, then the law relative to tenants at will has no application to this case.

We must look at the covenant he has made with the mortgagee to ascertain what his real situation is. We find from the deed between the parties, that the possession of his estate is secured to him until a certain day, and that if he does not redeem his pledge by that day, the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee. And there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same.

(a) 2 *Leonard*, 54.

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If this situation exposes mortgagors to any hardship, they must guard against it by an alteration in the terms of the mortgage deeds. Mortgagees, however, do not find it to their advantage to enter upon the estates if they can get their interest regularly paid; for from the time that they get possession, their situation is far from desirable, from the constant state of preparation that they must be in to account to the mortgagor whenever he shall be ready to discharge the mortgage-debt.

This circumstance has rendered any security for the mortgagor against hasty actions of ejectment unnecessary.

The rule for a nonsuit must be discharged.

Rule discharged accordingly.

MEMORANDUM.

In the course of this term *Edward Gouldburn Esq.* was called to the degree of the coif, and gave rings with the motto "*Nulla retrorsum.*"

END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

1829.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Tenth Year of the Reign of GEORGE IV.

BURNS v. CARTER and Others.

May 8.

BY the 52 G. 3. c. 14. an act for better paving the *Clink* liberty in the borough of *Southwark*, the commissioners appointed under the act, are empowered (s. 39.) to compensate the occupiers of premises, if they require them to quit, after purchasing the premises under that act.

The metropolis paving act, 57 G. 3. c. 29. s. 136. has repealed the *Clink* liberty paving act, 52 G. 3. c. 14. as to the time of commencing actions.

Section 122. enacts, that no action shall be commenced for any thing done in pursuance of that act until twenty-one days' notice thereof shall be given in writing to the clerk or treasurer, or after sufficient satisfaction, or tender thereof, or after *six* calendar months after the fact committed, for which such action shall be brought.

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By the metropolis general paving act, 57 G. 3. c. 29. s. 136., it is enacted, that no action shall be commenced for any thing done in execution or pursuance of any *local* act or acts of parliament relating either exclusively or jointly with any other objects or purposes to the pavement of any parochial or other district within the jurisdiction of that act, until twenty-one days after notice in writing, &c., nor after *three* calendar months next after the fact may be committed for which such action shall be brought.

But by s. 138. of that act it is enacted, that neither any act or acts relating either exclusively, or jointly with any other objects, to the paving or repairing the pavements of the streets or public places in any parochial or other district within the jurisdiction of that act, shall be thereby repealed.

The Plaintiff was in the occupation of a house in the *Clink* liberty; the Defendants requiring the premises for purposes connected with the *Clink* paving act, paid a compensation to the parties who appeared to them to possess any interest in the same; and considering that the Plaintiff had none, gave him notice to quit, without any compensation. The Plaintiff considering himself to be entitled to something, declined to quit, whereupon the Defendants on the 13th of *July*, entered, and accomplished their objects.

On the 20th of *August* ensuing, the Plaintiff gave them notice of an action of trespass, and commenced this action on the 11th of *January* 1828.

At the trial before the Chief Baron, last *Surrey* assizes, it was objected that the action ought to have been commenced within three calendar months pursuant to the 57 G. 3. c. 29. s. 136., which, in that respect at least, it was contended, had repealed the 52 G. 3. c. 14. s. 122., and the learned Chief Baron being clearly of this opinion, the Plaintiff was nonsuited; whereupon

Andrews

Andrews Serjt. now moved to set aside the nonsuit, on the ground that this was in effect an action brought for a compensation; that the compensation sought, could only be given under the *Clink* paving act, and, therefore, must still be regulated by the terms of that act, notwithstanding the 136th section of 57 G. 3. c. 29., especially when the 138th section of that act had expressly provided that no local act relating to the pavement should be repealed. If the action were regulated by the *Clink* paving act, it was commenced in time.

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BEST C. J. Whatever may be the case as to other matters, with respect to the time for suing, the 57 G. 3. c. 29. is express, that for any thing done under the local act, the action must be commenced within three calendar months. There is no ground for disturbing the nonsuit.

PARK J. It has been ingeniously put by the learned Serjeant, that as in this instance the Defendants could only proceed under the local act, the time for suing should also be regulated by that act. But when we see that s. 136. of the general act applies to all that is done under the local act, his ingenious fabric falls to the ground.

The rest of the Court concurred.

Rule refused.

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May 9.

KNIGHT v. HUNT.

Plaintiff had refused to sign an agreement to receive of his debtor a composition of 10s. in the pound; but the debtor's brother offering to supply him with coal to the amount of the other 10s., he signed the composition agreement.

The other creditors knew nothing of the coal transaction.

Plaintiff having been supplied with the coals,

Held, that he could not recover upon a promissory note for the amount of the 10s. composition.

ONE *William Watson* being in bad circumstances, proposed to compound with his creditors for 10s. in the pound.

The Plaintiff, to whom he owed 300*l.*, refused to accede to the proposal. Whereupon *John Watson, W. Watson's* brother, went to the Plaintiff, and spontaneously agreed at his own cost to supply the Plaintiff with coals to the amount of 150*l.* if he would sign the agreement for *William Watson's* composition. The Plaintiff consented, and then signed an agreement, dated *October 20. 1818*; "To take 10s. in the pound, to be paid with the other creditors." The Plaintiff signed the last, but the arrangement about the coals was not known to the other creditors.

For the 10s. in the pound the Plaintiff afterwards agreed to take the joint and several promissory note of *William Watson, one Aldred*, and the Defendant, payable on demand, with interest.

The note was given, and bore date *November 1. 1818*. *John Watson* furnished the Plaintiff with coals to the amount agreed on, and interest was paid on the promissory note.

The note, however, remaining unpaid, the Plaintiff at length put it in suit against the Defendant.

At the trial before *Littledale J.* last *Winchester* assizes, a verdict was, upon proof of the foregoing facts, found for the Defendant, on the ground that the Plaintiff had, by the amount in coals delivered by *John Watson*, received as much as the other creditors, and that any contract for more was void as a fraud on them.

Bompas

Bompas Serjt. now moved to set aside this verdict, and for a new trial. He contended, that the coal transaction was no fraud on the other creditors, and he distinguished the case from all the cases on composition agreements (beginning with *Cockshott v. Bennett* (a), and ending with *Thomas v. Courtney* (b) in the following respects ;

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1st, That this was not by or at the instigation of the insolvent, nor even at the request of the creditor, but was a spontaneous and honourable offer on the part of a relation of the debtor, to make up, out of his own substance, a loss occasioned by his brother.

2dly, That it was attended with no detriment, either to the insolvent or the creditors at large ; and the ground of many of the decisions was, the injury to the general body of creditors.

3dly, That, inasmuch as the Plaintiff was the last to sign, the other creditors could not have been influenced by his supposed concurrence.

Lastly, he contended, that though an agreement for a particular creditor to receive more than the others was void in itself, and though it might under some circumstances avoid a release given to the debtor, yet it had never been holden to avoid the debtor's stipulation to pay the sum specified in the composition deed. The Plaintiff might, perhaps, have failed to enforce *John Watson's* agreement to supply him with coals, but that would not affect the validity of the debtor's agreement to pay 10s. in the pound, or of a note given in pursuance of such agreement.

BEST C. J. There is not the slightest pretence for this motion. These agreements for composition with creditors require the strictest good faith. If I see a

(a) 2 T. R. 763.

(b) 1 B. & A. 1.

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man, acquainted with the circumstances of the debtor, agreeing to sign a paper, under which he is to be satisfied with 10s. in the pound, I conclude he has exercised a judgment on the subject. Am I not cheated if he procures another to give him 10s. more? Perhaps there is no case exactly like this; but as no two cases are ever alike in all respects, the best way is to extract a principle from analogous decisions, and the principle to be extracted from all the cases on this subject is, that a man who enters into an engagement of this kind is not to be deceived.

It has been argued, that here the debtor was not injured, nor the funds for other creditors rendered less available. No doubt those topics have been urged in some of the cases; but one question always is, Whether the judgment of the creditors has been influenced by the supposition, that all are to suffer in the same proportion? That was the case here. It is a very different thing, where, without any previous contract, a debtor after having discharged his engagements under the composition deed, honourably adds the remainder. A transaction of that kind is clearly distinguishable from the present, where, by previous and express contract, the whole of the debt, or an equivalent, is secured to a particular creditor. Here the Plaintiff has had his 10s. in the pound in coal, and he cannot have it again in money.

PARK J. It seems to me only necessary to distinguish between a gratuitous gift after the payment under the composition, and a previous understanding that a particular creditor shall receive more than the others. Here there was such a previous understanding, and the verdict was perfectly proper.

BURROUGH J. and GASELEE J. concurring,

The rule was refused.

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PROVIS and ROWE v. REED.

May 9.

WRIT of entry *sur* abatement.

The demandants claimed as heirs of *Henry Sara*. The Defendant, (who had been in possession twenty-seven years,) under his will.

The demandants proposed to shew that the will was executed in the presence of only two attesting witnesses, and that the name of a third was added after the death of the devisor.

At the trial before *Gaselee J.*, last *Cornwall* assizes, the demandants' pedigree having been admitted, the learned Judge ruled that the Defendant was entitled to begin, and he having by one of the attesting witnesses (a servant of the devisor) established the due execution of the will in the presence of three witnesses, one of whom was *Mr. Scott*, the attorney who had prepared the will, but was since dead, as well as the third attesting witness,

The demandants called a person who deposed that the day after the death of the devisor, *Mr. Scott* said to him, "There is an oversight; the will is not properly executed; but it is not of much consequence: we can manage it between ourselves;" that he then called a female, and desired her to write her name under those of the two attesting witnesses.

The demandants then proposed to give evidence of the following among other declarations made by the devisor touching the will: —

"*Tom Reed* (the Defendant) has been trying to get my property, but neither he nor his shall have it. *Scott* drew up a paper, and they got me to sign it; but never

H h 4

fear,

1. Where one of the attesting witnesses to a will is dead, witnesses may be called to his character.

2. Declarations of the testator in subversion of a will are not admissible in evidence, though both parties claim under him, and though they are offered with a view to shew the manner in which the will was executed.

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fear, I know that is not worth, to read, one farthing.”—
“ My land goes to my own family. *Peggy* (one of the demandants), remember the land is yours; if I don’t live to make my will, when I’m dead see that you are righted.”

The learned Judge rejected the evidence, and on the part of the Defendant admitted witnesses to speak to the character of *Scott*, the attorney, who had prepared the will.

His character being of the highest order, the jury found a verdict for the Defendant; whereupon

Taddy Serjt. now moved for a new trial, on the ground that evidence of the testator’s declarations had been improperly rejected, and evidence of the character of the attesting witness improperly admitted. Although in general declarations could not be received to defeat a written instrument, yet these were admissible on two grounds: first, because they were the declarations of one under whom both parties claimed; the declarations, as it were, of an ancestor, a privy in estate; and, secondly, because they were not offered to contradict the will, but merely to shew whether two or three witnesses were present at the execution. The evidence was quite *dehors* the will, and went to a fact altogether independent of the construction of the instrument.

Then, *Scott*’s character had nothing to do with the issue in the cause; evidence of character had never before been received in answer to naked facts. No issue had been joined on the character of *Scott*, and if the Defendant was entitled to offer evidence of his good character, the demandants must have been equally entitled to offer evidence of an opposite description. They could not be prepared on such a point, and the power of raising it would lead to the utmost inconvenience. The rule in *Bull. N. P. 295.* was expressly contrary,

contrary, and made no distinction in favour of witnesses to wills. [*Gaselee J.* The same evidence was admitted in *Doe d. Walker v. Stephenson (a)*, and that case was recognized in *Bishop of Durham v. Beaumont. (b)*] They are only *Nisi Prius* decisions, and the case in *Espinasse* can scarcely be law, since, there, evidence is said to have been called to the character of two witnesses who were unimpeached.

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BEST C. J. Two objections have been made to the verdict in this cause: that evidence has been rejected which ought to have been received, and evidence received which ought to have been rejected. It has been insisted, that declarations of the testator were admissible in evidence to shew that the will he had executed was not valid; but no case has been cited in support of such a position, and we shall not for the first time establish a doctrine which would render useless the precaution of making a will; for if such evidence were admissible, some witness would constantly be brought forward to set aside the most solemn instruments. Such a doctrine would be not only in the highest degree inconvenient, but contrary to the first principles of evidence, according to which the will itself is the best evidence which the nature of the case supplies. It has been urged, however, that the declarations are admissible as having been made by one under whom both of the contending parties claim, upon the same principle as the declarations of a common ancestor. Declarations of a common ancestor as to the state of his family, pedigree, and other matters peculiarly within his knowledge, are undoubtedly admissible in evidence; but they are wholly different from declarations tending to impeach the validity of a written instrument which have

(a) 3 *Esp. N. P. C.* 284.(b) 1 *Campb.* 210.

never

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never yet been received; and I am clearly of opinion were properly rejected in the present instance.

Then, with regard to the imputations on the character of *Scott*, the attesting witness who prepared the will; if the demandants had merely imputed to him an error in judgment, perhaps the evidence would not have been admissible; but if it were imputed to *Scott* that, having caused a will to be executed imperfectly, he had added an attesting witness after the death of the testator; — that in effect he had committed a forgery; — if his moral character were thus attacked, those who were interested in it had a right to defend it. A passage has been cited from *Buller's Nisi Prius*, and it has been contended that there is no distinction between the case of an attesting witness to a will, and the witnesses to bills, notes, and the like. But bills are usually instruments of a recent date, while wills are often undisputed till all the parties present at the execution of them have ceased to be in existence. The present writ of entry was sued out no less than twenty-seven years after the time of the transaction to which it relates. In such a case there is no way of protecting the character of a witness other than the admitting such evidence as has been here received. In many cases necessity forms the law. The necessity of admitting the evidence in this case is manifest, and the two decisions which have been cited, one of them from no less an authority than Lord *Kenyon*, are clearly in point. I have repeatedly tendered such evidence myself in similar cases when at the bar. I have had it tendered on the other side, and have never objected, and the common practice of *Westminster Hall* has always been to receive it. That practice, perhaps, is better evidence of the law even than decided cases; and the Court, therefore, cannot grant the rule which has been prayed on the part of the demandants.

PARK

PARK J. I am of the same opinion on both points. The evidence of declarations of the testator incompatible with the validity of the will, was properly rejected. When the legislature has taken such care to prevent frauds in wills, and when it is considered how easily declarations may be extorted by artful persons after the intellect of a testator has been impaired by time, it would be most mischievous, and a violation of all established principle, to allow such declarations to be received in evidence.

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Then, the testimony to the character of *Scott* was properly admitted according to the general understanding and practice of *Westminster Hall* for many years, and according to decided cases.

BURROUGH J. referred to a case tried before him recently at the *Exeter* assizes, *Doe d. Teage v. Wood*, where evidence of the same kind was admitted to establish the character of a deceased attesting witness to a will.

GASELEE J. concurring with the rest of the Court, the rule was

Refused.

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May 9.

COE v. CLAY.

He who lets, agrees to give possession, and if he fails to do so, the lessee may recover damages against him, and is not driven to bring an ejectment.

THE Defendant had agreed to let the Plaintiff certain premises *per verba de præsenti*; and this was an action for not letting him into possession, which, a preceding occupier having wrongfully refused to quit, the Defendant was unable to effect.

At the trial before *Vaughan B.*, last *Cambridge assizes*, the agreement having been proved, it was objected on behalf of the Defendant, that the Plaintiff had shewn no breach, for that the agreement amounting to an actual demise of the premises, the Plaintiff had an interest upon which he might have brought an ejectment, and it was no default in the Defendant, if a person not claiming under him committed a wrong for which the Plaintiff had a distinct remedy by ejectment. Supposing the law to be otherwise, every one who made a new demise would be liable to damages if an obstinate tenant held over.

A verdict, however, having been found for the Plaintiff,

Peake Serjt. moved to set it aside on the grounds urged at the trial; but

The Court were all clearly of opinion, that he who lets, agrees to give possession, and not merely to give a chance of a law suit; and the breach assigned, being, that the Defendant did not give the Plaintiff possession, a rule was

Refused.

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DOE dem. DIXON and Another v. WILLIS and
Another.

May 12.

THE lessors of the Plaintiff claimed the lands sought to be recovered in this ejectment under a conveyance from *Rose*, a former owner, in trust to sell and pay off, first, certain incumbrances, and then a debt due from *Rose* to the lessors of the Plaintiff. The conveyance bore date *November* 1824, and the lessors of the Plaintiff had had an equitable mortgage of the premises during three years preceding. Early in 1824, the commissioners, under an inclosure act, had made *Rose* an allotment in respect of the premises, but their award was not executed till 1827.

Where commissioners, under an enclosure, made an allotment in respect of *R.*'s land in 1824, Held, that the allotment passed by a subsequent conveyance of the land in 1824, although the commissioners' award was not executed till 1827.

The Defendants claimed under *elegits* issued upon judgments entered up in *November* and *December* 1824, subsequently to the conveyance. The action had been commenced early in that year.

At the trial before *Vaughan B.*, last *Aylesbury* assizes, it was contended on the part of the Defendants, that the conveyance under which the lessors of the Plaintiff claimed, was, under the statute of *Elizabeth*, fraudulent as against creditors, and that at all events the award of the commissioners under the inclosure not having been made till 1827, the allotment made by them to *Rose* did not pass under his conveyance to the lessors of the Plaintiff.

The jury having found there was no fraud, and having given a verdict for the lessors of the Plaintiff,

Taddy Serjt. moved to set it aside on the grounds urged at the trial; but

The

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The Court, after ascertaining from the learned Baron, that the question of fraud had been set at rest by the express finding of the jury, held that the allotment of the commissioners under the enclosure in respect of *Rose's* land, passed to the lessors of the Plaintiff by the conveyance of the land, and the rule was

Refused.

May 12.

WITHINGTON v. HERRING and Others.

Defendants entered into an agreement with C. to carry on for them certain mining speculations in

America, — furnished him with instructions, — a letter authorising him to draw on them for 10,000*l.*, — and a power of attorney of the most ex-

tensive description, “to take and work mines, to purchase tools and materials, and erect the necessary buildings, and to execute any deeds or instruments he might deem necessary for the purpose.”

C., after he had raised 10,000*l.* under the letter of authority, obtained of Plaintiff in *America* 1500*l.*, which he applied to the Defendant's use, and for the amount, drew bills on Defendants, which he indorsed to Plaintiff. He did not shew the letter of authority to the Plaintiff; there were no indorsements on it of sums previously raised, and it did not appear that the Plaintiff knew that any money had been raised before by C.: the defendants refused to accept the bills.

Held, that Plaintiff was entitled to recover 1500*l.* from Defendants, as money had and received to his use.


THE Defendants, merchants in the city of *London*, being about to speculate in mining concerns, entered into the following agreement with Mr. *John Crabtree*, and then furnished him with the letter of instructions, the letter authorizing him to draw on them, and the power of attorney set forth in the following pages.

“*Memorandum* of agreement between Mr. *John Crabtree* and Messrs. *Herring, Graham, and Powles*.

“Messrs. *Herring, Graham, and Powles* being desirous to enter into contracts for working such of the mines in *Peru* as may offer suitable encouragement for doing so, with the view of forming an association for the sub-

sequent

sequent performance of such contracts, it is agreed that Mr. *Crabtree* shall proceed to *Peru* by the first *Jamaica* packet, to carry this object into effect, if he shall find it practicable and expedient to do so.

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“ Mr. *Crabtree* shall be furnished by Messrs. *Herring*, *Graham*, and *Powles* with their power of attorney, authorising him to enter into such proposed contracts on their behalf, which he engages to use in conformity with the instructions he may from time to time receive from them.

“ Messrs. *Herring*, *Graham*, and *Powles* shall defray all Mr. *Crabtree*'s reasonable travelling expenses, and expenses of living during the continuance of this mission.

“ Mr. *Crabtree* shall receive from Messrs. *Herring*, *Graham*, and *Powles* for his remuneration the sum of 1000*l.*, and if this mission shall occupy Mr. *Crabtree* more than a twelvemonth from the date of his leaving *London* to embark in the packet, he shall receive at the rate of 1000*l.* per annum from the said date.

“ Mr. *Crabtree* shall further receive one fifth share of the clear profits which Messrs. *Herring*, *Graham*, and *Powles* may make by such contracts, or by forming the association to be founded on the contracts to be entered into by him.

“ *London*, 1st January 1825.

“ HERRING, GRAHAM, and POWLES.

“ JOHN CRABTREE.”

“ *London*, January 7. 1825.

“ Dear Sir, — We have now to request your attention to the following instructions on the objects of your mission to *Peru*.

“ On your arrival in *Peru*, your first care will necessarily be to ascertain whether the political condition of
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the country be so far settled as to render it prudent to undertake any extensive engagements there. We need say nothing as to the means of ascertaining this fundamental point, or the rules by which you should be governed in deciding it. You know the character of the people, and the nature of the country, and you will have the best channels of information open to you. We will only remark, that we should prefer measures being delayed so long as any serious doubts on this head may remain on your mind.

“ Presuming this point satisfactorily settled, your next object will be to make engagements in our name, and in our behalf, for working such of the mines as, on good information, you may learn to be the most promising. Among other considerations, the following will deserve your attention; viz. the proximity of the mines to water communication, so as to afford convenient means of transport for steam-engines and other machinery; their being situated in a neighbourhood where fuel for steam-engines and for smelting is to be found, and where labourers acquainted with mining are to be had; and the salubrity of the situation, with a view to the employment of *European* miners.

“ The way in which mines may be secured, are as follows, viz.

“ First, by making contracts or leases with the government, for working such as may be government property. In this way we have engaged the *Mariquita* mines from the *Columbian* government. Copy of the lease or contract for two of which we enclose for your government. No. 1.

“ Secondly, by making contracts with individuals who may be proprietors of mines, on the principle of undertaking to put the mines at work, giving the proprietors a certain portion of the nett produce. This
portion

portion varies according to the quality and circumstances of the mine. In some cases one third, in others half, and in others two thirds being conceded to the owners. These terms apply more particularly to *Mexico*, which mines being so much nearer to *Europe*, are necessarily much more desirable to *English* capitalists. We should think that in no case could any mine proprietor in *Peru* look for more than half the net proceeds of the mine. The term of such contracts should be twenty-one years. We enclose for your government (No. 2.) the copy of a contract made in *London*, for working a mine in *Mexico*, the provisions of which are considered very fair on both sides. We should recommend your taking this contract as a model in any such engagements, it having been prepared by one of the most experienced miners in *England*.

“ It is indispensable that we take the entire management of the mine; and very much for the interest of the proprietors themselves that we should do so.

“ The third way of securing mines is, by taking possession of such as may be liable to be denounced by having been abandoned by their former possessors. This is the most desirable way of obtaining mines, if practicable, the entire possession being thereby secured; but some difficulty may arise, if it should happen (as is the case in some parts) that none but *citizens* can denounce mines. It will be so much the interest of the government to draw forth the resources of the country, that every practicable facility may reasonably be anticipated from them, and, perhaps, if the name of a citizen be necessary, that of General *Miller* (who is doubtless a naturalised citizen of *Peru*) may probably be made use of by making an arrangement with him for that purpose. Of all this you will be best able to judge on the spot. There is one consideration, however, we

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should wish you to bear in mind, on the subject of abandoned mines, and that is, that where they have only been suspended working by the temporary difficulties of the proprietors, occasioned by the struggle for the establishment of independence, we should by no means wish to deprive such persons of the possession of their property. We would much rather purchase their rights either by money or by an annual allowance, than take advantage of their misfortunes: but where mines appear to be wholly deserted by their former proprietors, without hope of their being able to resume the working them, and, consequently, are liable to be denounced by any person possessing competent means for working them, we see no objection to your taking measures for gaining possession of such mines, if practicable.

“ We need hardly suggest to you, that, in whatever manner you may obtain mines, whether by lease or contract, or possession, it will be very important to see a clear legal title established, that we may be going on a secure foundation in this respect.

“ As to the locality of mines, it is important to keep in view that the more you can meet with (if good) in one district, the better, for the greater convenience of management.

“ As it may be important to make advances to some of the mine proprietors on the execution of the contracts with them, we enclose (No. 3.) a letter of credit, authorizing you to draw on us for 10,000*l.*, or 50,000 dollars, to be applied to this or the other purposes of this undertaking.

“ If you succeed in making the proposed engagements for mines, you will please have them executed in four parts, and send three to us by different opportunities; the first by Mr. *Miller*, who accompanies you, and who will in that case return with all possible despatch,

spatch, and the other two by the quickest and safest occasions you can find.

“ You will at the same time forward to us the fullest details regarding the mines you may engage, derived from persons practically conversant with the subject, so as to enable us to judge of the description of machinery and other assistance necessary to be despatched from this country, which will be immediately forwarded.

“ For the purpose of enabling you to carry these instructions into effect, we enclose you our power of attorney (No. 4.)

“ We remain, &c.

“ HERRING, GRAHAM, and POWLES.”

“ *J. Crabtree, Esq.*”

(No. 3.)

“ *London, January 7. 1825.*

“ Dear Sir, — We hereby authorize you to draw upon us for the sum of 10,000*l.* sterling, or 50,000 *Spanish* dollars, and we undertake to honour your drafts accordingly.

“ We are, &c.

“ HERRING, GRAHAM, and POWLES.”

“ To *J. Crabtree, Esq.*”

(No. 4.)

“ To all persons to whom these presents shall come, We, *Charles Herring, William Graham, and John D. Powles*, of the city of *London*, merchants, send greeting: Whereas we contemplate entering into certain undertakings within the empire, states, territories, dominions, and dependencies of *Peru*, in *South America*, and for carrying the same into effect, we have agreed with *John Crabtree*, of the city of *London*, Gent., that he shall proceed to *Peru* with such powers as are hereinafter delegated to him, Now know ye, and these presents witness, that we, the said *Charles Herring,*

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William Graham, and J. D. Powles have, and each and every of us hath made, ordained, nominated, constituted, and appointed, and in our and each of our place and stead put and deputed, and by these presents do, and each and every of us do make, ordain, nominate, constitute, and appoint, and in our and each of our place and stead, put and depute, and by these presents do and each and every of us doth make, ordain, nominate, constitute, and appoint the said John Crabtree to be our and each of our true and lawful attorney for us and each of us, and in our or each of our names or name, or in the name of our said attorney, to enter into, transact, complete, and execute all such negotiations, proposals, contracts, engagements, or agreements which our said attorney shall in relation to the said proposals, undertakings, or any of them, deem it expedient or proper to enter into, transact, complete, and execute with the government or governments for the time being of the said empire, states, territories, and dominions of Peru and their dependencies in South America, or any of the ministers, officers, branches, or departments thereof respectively; or with any public or private companies or other persons entitled to, interested in, or having the care, superintendence, management, government, agency, control, or direction of or over any mine or mines, vein or veins of ore whatsoever, situate and being, or which may hereafter be found or discovered, or be denounced within any part or parts of the aforesaid empire, states, territories, or dominions and their respective dependencies, for the purpose of obtaining a grant, demise, or lease of any such mines or veins, or of any lands or grounds over or adjoining the same, or for the purchase of any ore or ores, or of the right to open, dig, or work any mine or mines, or to smelt and refine the ores thereof, or any other ores, or otherwise touching or concerning the management, conduct, or carrying on of the works of any such mines, or any other

other works or undertakings, or in, about, or relating to the same, or to the smelting and refining of the ores thereof, or any other ores, and for the purposes and objects aforesaid, or any of them, or in relation thereto, and to the completion thereof, for us and each of us, and in our and each or either of our names, and as our and each of our acts and deeds, or in the name of our said attorney, to enter into, make, sign, seal, execute, and deliver such deeds, conveyances, leases, grants, covenants, petitions, memorials, and other instruments, acts, and writings whatsoever as in the judgment or opinion of our said attorney shall appear requisite or expedient, and also for the purposes and objects aforesaid, or any of them, or in relation or incidental thereto, or to any of them, to take to himself, hire, engage, or employ all such engineers, surveyors, agents, collectors, clerks, artificers, artisans, workmen, and other persons, and at such salaries and rate of compensation or recompense as our said attorney shall in his discretion think requisite, proper, or expedient; and also for him, our said attorney, to conduct, manage, superintend, and carry on, and purchase all needful and necessary tools, implements, and materials, and erect and establish all proper and needful buildings and other works for the conducting and carrying on in a beneficial manner the works of any such mines, and the smelting and refining of any such ore or ores through all the different processes and branches thereof, in such a manner in all respects as our said attorney shall think advisable and expedient for our benefit and advantage; and also for him, our said attorney, from time to time to contract to sell, and absolutely to sell and dispose of the produce and proceeds of any such mines or ores, or any part thereof, or barter, or exchange and deliver the same for or in lieu of any goods, wares, or merchandize, the produce of Peru, or otherwise, as to our said at-

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torney shall seem meet, or convenient, or expedient, and also in the discretion of our said attorney to transmit to *England* to us, or on our account, all or any part of the proceeds or produce of any such mines or ores, or of the goods, wares, or merchandize received or taken by way of barter or exchange as aforesaid, or else to sell or dispose of any such goods, wares, or merchandize so received or taken in exchange aforesaid, and also to ask, demand, sue for, recover, and receive of and from all and every person or persons whomsoever, liable, interested, or compellable in that behalf, all debts, sums of money, bonds, bills, notes, securities for money, goods, chattels, or effects, which in the prosecution of the said undertakings, or any of them, or in relation to the purposes and objects aforesaid, or arising out of the same, shall become due, owing, payable, or deliverable, or of right shall belong to us, or any or either of us, and upon receipt or delivery thereof respectively, or of any part thereof, to make, sign, seal, and execute, and deliver good and sufficient receipts, releases, acquittances, and other discharges for the same; and also, if necessary, to compound any debts, sums of money, claims, and demands so due and owing, or to become due and owing to us, or any or either of us, and to take less than the whole in full for the same, and to extend the time of payment thereof, or the delivery of any goods or effects, and to accept security for the same respectively, or any part thereof; and also to adjust, settle, and allow, or to disallow any accounts which may subsist between us or any other person or persons, or between our said attorney or any other person or persons in respect or any way relating to such mines or ores, or the working, smelting, or refining thereof, or the proceeds or produce thereof, or to any goods or effects bartered, sold, or exchanged as aforesaid, or to any of the purposes or objects aforesaid, or to

to any other matter, cause, or thing relating thereto or arising out of the same respectively, wherein we may be in any manner interested or concerned; *and for all or any of the purposes or objects aforesaid or relating thereto, for us and in our and each and either of our names or name, and as our and each of our act and deed, or in the name of our said attorney, to sign, seal, execute, and deliver any deed of composition or release, or other deeds, bonds of arbitration, or other bonds, agreements, instruments, assignments, assurances, and other acts whatsoever, as there may be occasion in the judgment or opinion of our said attorney; and, accordingly, to perform and carry into full effect any covenant, engagement, or liability, in such deeds or other instruments or assurances to be contained on our parts or behalves, or on the part of our said attorney; and also in manner aforesaid, or otherwise, to commence, sue forth, and prosecute any action, suits, processes, or other proceedings whatsoever according to the laws of the country, which it may be necessary or expedient in the judgment or opinion of our said attorney to commence, sue forth, and prosecute in and about, and for the purpose of carrying into effect, all or any of the purposes or objects hereinbefore mentioned, and the powers and authorities herein contained; and if he shall think it proper or expedient, to discontinue or become nonsuit in any such action, suits, or proceedings; and also to defend any action, suits, and proceedings which may be instituted against us, any, or either of us, or against our said attorney on our, any or either of our accounts in relation to the premises, and for or about or respecting any of the purposes or objects aforesaid, to appear in or before any courts, tribunals, judges, ministers, or officers whatsoever, when and as there may be occasion, and there to make such protests, appeals, and declarations, and to take, adopt, and pursue*

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all such other proceedings as our interest may from time to time require, and as to our said attorney shall seem requisite and expedient, *and generally for the purposes aforesaid, or any of them, or otherwise in relation to the premises, to transmit, negotiate, manage, execute, and perform all such acts, deeds, matters, and things whatsoever, as to our said attorney shall in his judgment and opinion seem meet or expedient* to be done or performed in and about all and singular the premises aforesaid; *and that as fully, extensively, and effectually in all respects, and to all intents and purposes whatsoever, as we ourselves could do, perform, or act in the same if we were personally present and acting therein;* and we do hereby give and grant unto our said attorney full power and authority from time to time to nominate, substitute, and appoint one or more attorney or attorneys under him, to act in and about all or any of the purposes or objects, and such substituted attorney or attorneys at pleasure to dismiss from time to time, and notwithstanding the substitution of any other attorney or attorneys as aforesaid, to exercise and perform all or any of the powers and authorities hereinbefore expressed and contained, and given to him; and we do hereby give and grant unto our said attorney, and his substitute and substitutes to be appointed from time to time, our full and whole power and authority over the premises; and we do hereby promise and agree to ratify and confirm, and allow all and whatsoever our said attorney and such substitute or substitutes shall lawfully do or cause to be done in and about the premises, under and by virtue of these presents. In witness whereof we have hereunto set our hands and seals at *London* the 8th day of *January* 1825.

“ CHARLES HERRING.

“ WILLIAM GRAHAM.

“ WILLIAM D. POWLES.”

Crabtree, after he had raised more than 10,000*l.* under this power, obtained from the Plaintiff in *Peru*, among other sums, 1500*l.*, which he applied to the Defendants' use, and drew bills on the Defendants for the amount.

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These bills the Defendants did not accept or pay, whereupon the Plaintiff, considering the drawing of them by the agent to be equivalent to an acceptance by the Defendants, brought an action to recover the amount, and declared on the bills, adding counts for money paid, money had and received, and on an account stated.

At the trial before *Best* C. J., *Guildhall* sittings after *Michaelmas* term, *Crabtree* stated that he did not shew the letter of credit to the Plaintiff; that there were no indorsements on it of sums advanced by others, but he could not say that the Plaintiff was acquainted with that fact; that he could not state whether he had shewn the Plaintiff the power of attorney or not; but that it lay separate from the other instruments in order to be shewn to any who might require to see it.

The jury gave a verdict for the Plaintiff, and found specially,

1. That it was the duty of the Plaintiff to call for the power of attorney and letter of credit.
2. That there was no evidence whether he had done so or not; and
3. That there was no evidence of his having been informed that money had been advanced by others under the letter of credit.

Wilde Serjt. obtained a rule *nisi* to set aside this verdict, on the ground that the power given to *Crabtree* did not authorize him to raise a sum beyond the 10,000*l.* mentioned in the letter of credit, or for any purpose but obtaining the lease of mines.

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Taddy Serjt. (*Russell* Serjt. was with him), who shewed cause, contended, first, that by the agreement for a fifth part of the profits between *Crabtree* and the Defendants, *Crabtree* became their partner, and, so, competent to engage them to any extent : and, secondly, that even if this were not so, the power given to him was, notwithstanding the letter of credit, sufficiently ample to enable him to raise money for any purpose and to any extent.

On the first head, he admitted, that a clerk might be paid by a *per centage* on profits, without becoming a partner ; but here, *Crabtree* was to have a specific salary as clerk (1000*l.* a year), and to have one-fifth of the profits besides, which clearly made him a partner. *Waugh v. Carver* (a), *Hesketh v. Blanchard* (b). But on the second, he contended that a more ample power could not be given, and that *Crabtree* was not confined to the hiring of mines, but was authorized to purchase ; and if so, to raise money to the necessary extent, as amply as his principals themselves could have done.

Russell was stopped by the Court.

Wilde and *Stephen* Serjts., in support of the rule, rested their case on the following positions : —

1st. Where a power is accompanied by other instruments, the extent of the power must be collected from all the instruments taken together, and not from any one separately.

2d. General expressions in a power are limited and restrained by the nature of the particular object of the power. *Attwood v. Munnings* (c), *Hogg v. Snaithe* (d), *Hay v. Goldsmidt.* (e)

(a) 2 *H. B.* 247.

(b) 4 *East*, 144.

(c) 7 *B. & C.* 278.

(d) 1 *Taunt.* 347.

(e) *Id.* 349.

3d. Taking


3d. Taking the agreement, the instructions, the letter of credit, and the power, in this case, together, it is plain that *Crabtree* had only authority to raise money for taking mines under a lease (not for purchasing them), and to the extent of no more than 10,000*l*. The words *instrument* and *grant* must be construed with reference to the expressions with which they are accompanied: *noscuntur a sociis*; and the object of the whole is shewn by the words *demise* or *lease*. For the purpose of obtaining leases, there could be no necessity for raising a larger sum than 10,000*l*.

4th. It is the business of every one who deals with an agent, to satisfy himself of the nature and extent of the agent's authority before he deals.

5th. If the Plaintiff saw those authorities, his claim is defeated by the third proposition. If he might have seen them, and did not, he must suffer for his own neglect.

Shirreff v. Wilkes(a), *Saville v. Robertson*(b), and *Young v. Hunter*(c), were cited to shew that *Crabtree* did not become a partner with the Defendants by undertaking the conduct of the adventure under a stipulation to receive a portion of the profits. That was only intended as an addition to his salary as agent. It would occasion great alarm in the commercial world, if an agent with a limited authority were enabled to raise money to any extent, under the mere verbiage of a conveyancing power.

BEST C. J. It is not necessary to decide in this case whether *Crabtree* was a partner with the Defendants or not, as it seems to us that he was clearly their agent in this transaction. There is no ground for the alarm which it is supposed will be felt by the commercial world, for this was not a commercial transaction; and I might, perhaps, have forborne to leave the matter to the jury

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(a) 1 *East*, 48.

(b) 4 *T. R.* 720.

(c) 4 *Taunt.* 582.

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in the way in which it was left. But the jury have found that it is the duty of a party advancing money to an agent, to look at his power of attorney and letter of credit; negating, thereby, the necessity of calling for his letter of instructions; and properly, too, because the agent's letter of instructions may contain communications which it may be neither safe nor convenient to divulge. If, therefore, the power of attorney and letter of credit did not constitute a sufficient authority for what *Crabtree* has done, the Plaintiff is not entitled to recover. I am of opinion, connecting these two documents with the fact that the Plaintiff had no notice of other advances having been made, that *Crabtree* had sufficient authority to take up the money in question. I agree that an authority of this kind is to be taken strictly, and is not, by mere general words, to be extended beyond the particular object in view. But it is impossible to doubt that these two instruments do confer authority on *Crabtree* to raise money in order to carry into effect the object of his employers. It would be lamentable if a foreigner, who had advanced money on the faith of such instruments, should be told he ought to have sent to *England* for the opinion of an *English* conveyancer, when, upon the face of the instrument, a plain understanding could entertain no doubt. The language is as extensive as the empires with which the Defendants propose to have transactions: —

“ Each and every of us do make, ordain, nominate, constitute, and appoint the said *John Crabtree* to be our and each of our true and lawful attorney for us and each of us, and in our or each of our names or name, or in the name of our said attorney, to enter into, transact, *complete*, and execute all such negotiations, proposals, contracts, engagements, or agreements which our said attorney shall, in relation to the said proposals, undertakings, or any of them, deem it expedient or proper to enter into, transact, *complete*, and execute
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with the government or governments for the time being of the said empire, states, territories, and dominions of *Peru*, and their dependencies in *South America*, or any of the ministers, officers, branches, or departments thereof respectively, or with any public or private companies, or other persons entitled to, interested in, or having the care, superintendance, management, government, agency, control, or direction of or over any mine or mines, vein or veins of ore whatsoever, situate and being, or which may hereafter be found or discovered, or be denounced within any part or parts of the aforesaid empire, states, territories, or dominions, and their respective dependencies, for the purpose of obtaining a grant, demise, or lease of any such mines or veins, or of any lands or grounds over or adjoining the same, or for the *purchase* of any ore or ores, or of *the right to open, dig, or work any mine or mines.*"

It has been urged, that the meaning of the word *grant* must be collected from those with which it is accompanied, and is not to be extended beyond a lease. But how is a foreigner to make such a distinction? Looking at the instrument, however, with the eye of an *English* conveyancer, I should say that, taking the whole together, the word *grant* implies a conveyance upon absolute purchase as well as upon demise; and if *Crabtree* were authorized to purchase, he was impliedly authorized to raise money to effect his purchase.

But then, it is said, he was restricted by the letter of credit.

In *Beawes's Lex Mercatoria* there is a form of a letter of credit; and if the Defendants had pursued that, no difficulty could have arisen. According to that writer, a letter of credit is addressed to *A.*, *B.*, or *C.*, to advance the agent so much. The instrument executed by the Defendants in this case can scarcely be called a letter of credit; it is addressed to the agent himself; and if a man is foolish enough to sign such an instrument, he
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authorizes any one who does not know that money has already been raised, to advance 10,000*l.* to the holder. The jury here have found that there is no evidence of the Plaintiff's having been made acquainted with the fact that money had before been raised on the letter of credit, and it is for the persons who execute such instruments to shew that fraud has been practised against them, and not to call on the other party to enter upon proof of circumstances to which he may be an entire stranger. Our decision will produce no ill effect on commercial credit; it will tend to protect the inhabitants of other countries, and will compel merchants to send out none but honest agents.

PARK J. Powers of attorney must undoubtedly be construed strictly; and I agree in all that was said by the Court in *Attwood v. Munnings*; for it confirms the judgment we are now pronouncing. There, an agent having accepted a bill, *Holroyd J.* said, "The powers in question did not authorize this acceptance: the word *procuratio*n gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given."

The agent there had authority to indorse, and to accept bills drawn by agents or correspondents on the defendant; and the Court held a power to indorse exclusive of a power to accept, and a power to accept bills drawn by agents exclusive of a power to accept bills drawn by a partner. But *Holroyd J.* proceeds, — "As to the general powers;—these instruments do not give general powers, speaking at large, but only where they are necessary to carry the purposes of the special powers into effect." Taking that doctrine as correct, would any plain man, reading this power of attorney, suppose it did not confer on the attorney ample authority to do every act necessary to the acquiring property for his principals?

principals? If drawing bills was necessary, common sense says he had power to draw them for the purposes which he was intrusted to effect. He is to "enter into, transact, *complete*, and execute all such negotiations, proposals, contracts, engagements, or agreements which he may deem it expedient to enter into for the purpose of obtaining a grant, demise, or lease of any mine, or for the *purchase* of any ore, or of the right to dig or work any mine." How is he to complete any such engagements without paying? And how can it be said he is not authorized to purchase as well as to take on lease the right to work any mine? And by the general words at the end, he is to do all this "as fully, extensively, and effectually, in all respects and to all intents and purposes whatsoever, as we ourselves could do, perform, or act in the same, if we were personally present and acting therein." It would be most mischievous if a man were to be sent forth with such a power, and his principal, when it had been acted on, were to be permitted to say that such expressions are mere verbiage.

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BURROUGH J. The power given by the Defendants to *Crabtree* was clearly sufficient to authorize him to raise money for the Defendants' use. Without such a power the enterprise might have failed. It is unnecessary, therefore, to decide on the question of partnership, and the rule must be discharged.

GASELEE J. Supposing this not to be a partnership, I have difficulties on the other part of the case; but I agree with the rest of the Court in the propriety of not disturbing the verdict. *Crabtree* said, the power lay separate for the purpose of inspection. I presume that persons in the situation of the Plaintiff would look at the power before they advanced money, and it would be prejudicial to mercantile interests to restrain a power where the object in view requires an extensive authority.

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rity. As to the enquiries which it is alleged the Plaintiff ought to have made touching any sums advanced upon the letter of credit, it would have been useless to make them of *Crabtree*, who of course would not disclose any thing to defeat his own purpose, and impossible to make them with success elsewhere, as, for ought that could be learned in the absence of indorsements, *Crabtree* might have raised the money before he reached *America*.

Rule discharged.

May 15.

BRITTEN and Others v. HUGHES.

Plaintiff, holding two bills drawn by Defendant, one for 400*l.*, the other for 156*l.* 19*s.* 10*d.*, executed a composition-deed, containing a general release of the Defendant, and a schedule of the sums due to various creditors who executed the deed. After the Plaintiff's name was put the sum of 156*l.* 19*s.* 10*d.* only, at the request of the

ASSUMPSIT on a bill of exchange for 400*l.*, drawn and indorsed by the Defendant to *Sard* and *Smither*, who, having discounted it for him, indorsed it to the Plaintiffs. The bill was due May 4. 1826.

At the trial before *Best* C. J., *London* sittings after *Michaelmas* term, it appeared, that on the 10th May 1826, the Plaintiffs, who were also the holders of another bill, drawn by the Defendant for 156*l.* 19*s.* 10*d.* executed, in conjunction with other creditors of the Defendant, a release of "all and all manner of action and actions, suit and suits, cause and causes of action and suit, accounts, reckonings, bills, notes, sum and sums of money, and security for money, controversies, damages, claims, and demands whatsoever, which we the said several creditors of the said *Henry Hughes*, or any or either of us ever had or now have, or which we or any or either of us, or any or either of our respective

Defendant, who expected the Plaintiff would recover the bill for 400*l.* by suing the acceptor. The other creditors were not made acquainted with the fact, that the Plaintiff had a debt of 400*l.* as well as 156*l.* 19*s.* 10*d.* :

Held, he could not afterwards sue Defendant on the bill for 400*l.*

Gaselee J. dissents.

heirs,

heirs, executors, administrators, or assigns, can, shall, or may have, sue for, claim, challenge, or demand of, from, or against the said *Henry Hughes*, for or on account of any debt, claim, or demand of us, or any or either of us, in respect of any security, account, or reckoning now standing and being between us or any or either of us, or any part or parts thereof with or against the said *Henry Hughes*, as, for, or on account of any other matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of these presents."

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Names of Creditors.	Amount of Debts.	L. S.	Amount of Composition.
Britten, Wilson, } and Meek,	£ s. d. 156 19 10		£ s. d. 78 9 11

The Defendant relied on this deed as an answer to the action, and *Wilde* Serjt. cited *Holmer v. Viner (a)*, to shew that a party who signs a composition-deed cannot by splitting his demand, compound for a part only of his claim, and by reserving himself as to the residue, obtain a greater proportion of his debt than other creditors.

The Plaintiffs relied on *Payler v. Homersham (b)*, in which it was ruled on demurrer, that a party may plead that a composition has been executed for a part of his debt only; and they called a witness who proved an admission, on the part of the Defendant, that the 400*l.* bill had not been included in the release, because the Defendant expected that the acceptor would pay the bill, and the Plaintiffs, looking to him, abstained from taking composition-notes from the Defendant for the

(a) 1 *Esp.* 131.

(b) 4 *M. & S.* 422.

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amount,

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amount, which they had taken in respect of the bill for 156*l.* 19*s.* 10*d.*

The learned Chief Justice directed a nonsuit on the authority of *Holmer v. Viner*, and on the ground that it was a violation of the principle of a composition-deed, and legally a fraud on the other creditors, if they were induced to believe that a party was engaging to receive a composition upon the whole of his claims, when, in fact, he was receiving it only on a part.

Taddy Serjt. having obtained a rule *nisi* to set aside this nonsuit,

Wilde Serjt., who shewed cause, relied on *Holmer v. Viner* as in point, and as concurring in principle with *Jackson v. Lomas* (a), *Leicester v. Rose* (b), *Cecil v. Plaistow* (c), *Harrhy v. Wall*. (d)

Payler v. Homersham only decided, that an averment that a given debt was intended to be excluded from the operation of the release, was sufficient on demurrer; but such an averment was compatible with proof that all the creditors were made acquainted with the intention to exclude the debt, and if that had been shewn here, there would have been no objection to the Plaintiff's claim. The objection was, that for aught that appeared on the face of the composition-deed, the creditors, generally, were misled in supposing that the Plaintiffs had compounded for their whole demand, when, in fact, as to a large proportion of it, they were reserving their entire claim.

Taddy and *Jones* Serjts. supported the rule. *Payler v. Homersham* is in point for the Plaintiffs, and the other

(a) 4 *T. R.* 166.

(b) 4 *East*, 372.

(c) 1 *Anstr.* 202.

(d) 1 *B. & A.* 103.

cases do not apply to the circumstances of the present; for in them, either there was fraud, or the creditors had contracted to compound for the whole of their debts expressly. Here there was no fraud, and the very object of the Plaintiffs in putting the sum 156*l.* 19*s.* 10*d.* opposite their names, was to shew what they had compounded for, and what not. So that the general terms of the release were restricted, as they might be, to the extent particularly specified.

In *Cecil v. Plaistow* there was a general release without restriction, and the interests of a *feme covert* were involved; *Harrhy v. Wall* was a case of manifest fraud, and the party never specified for what amount he signed (a) In *Leicester v. Rose* the agreement was express for a composition of the whole debt; and even in *Holmer v. Viner* the insolvent had assigned all his effects for the benefit of his creditors, so that it might be reasonably presumed that they agreed to compound for the whole of their debts. But *Payler v. Homersham* has decided that a party may compound for a part only; that decision was acted on by *Best C. J.*, at *Guildhall*, *May 1st*, 1828, in *Fennell and Others v. Day*, the circumstances of which case did not differ from the present; and if a party may so compound, there can be no fairer way of doing so than by specifying in the deed, as here, the amount of debt compounded for. The course of pleading would be a test. If the present demand had been on a bond instead of a bill, the Defendant must have pleaded payment, accord and satisfaction, or release; payment or accord are out of the question; and a release of 156*l.* 19*s.* 10*d.* could not have been given in evidence as a release of 400*l.* As to legal fraud, there was none as against the Defendant, for it was at his request, and for his benefit, that the 400*l.* bill was not

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(a) 4 *Stark. N. P. C.* 195.

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included in the deed; none as against the creditors, the debtor's property not being affected by the transaction. The analogy between creditors coming in under a commission of bankrupt, and under a composition, is very close; and the creditors of a bankrupt are allowed to prove for one debt, and proceed at law for another. *Harley v. Greenwood.* (a) The present case is of that nature, and entirely distinguishable from any that have preceded it on the subject of debts claimed after a composition, in which the creditor has either obtained, first, a new security; or, secondly, an advantage by payment or security for the identical demand; or, thirdly, there has been an assignment of all the debtor's property; or, fourthly, a splitting of one entire demand. The demand now made is on an instrument unconnected with that for which the composition was accepted.

BEST C. J. I continue of the same opinion as at the time of the trial, and I am confirmed in it by adverting to the terms of the composition-deed. I am not embarrassed by my own decision in *Fennell v. Day*, because if I were wrong then, that would be no reason, as Lord *Kenyon* said upon a similar occasion, for my continuing to be wrong now; however, the question now before the Court was not raised in that case. I only decided there, on the authority of *Payler v. Homersham*, that a debtor may, where the other creditors are not kept in ignorance of the fact, make a composition for a portion of his debts, and that general terms in a deed may be restrained by particular terms in the same instrument. But I put this case on the ground of fraud: I do not mean moral fraud, but fraud in law; and a practice of this sort has a great tendency to encourage moral fraud. The nonsuit, therefore, was right on the authority of decided cases; for

(a) 5 B. & A. 95.

Holmer v. Viner is in point, and is not a mere *nisi prius* decision, because an application was afterwards made in *banc* to set aside the nonsuit, and a rule was refused. In that case the plaintiff, who had two demands, having signed the composition-deed as to one of them only, Lord *Kenyon* said, that he could not so split his demand; and no decision has been cited at variance with that. *Leicester v. Rose* has decided, that taking a different security is a fraud on the other creditors, because they no longer stand on the same footing; and *Cecil v. Plaistow* was determined on the principle which we now adopt, that it is a fraud on the other creditors to sign the composition-deed for a portion only of the party's demand, unless the other creditors are aware of the fact.

But without the authority of cases, the principle is clear, that upon a composition deed, all the parties are supposed to stand in the same situation, and if there is any one of them who refuses to do so, he must announce it at the time. The Plaintiff here says he will take 10s. in the pound; the others probably esteem it useless to stand out after that; and if they suppose the Plaintiff signs for the whole of his demand when such is not the fact, they are not in a condition to form a correct judgment on the subject. Independently, therefore, of the terms of this deed, if we decided in favour of the Plaintiff's claim, we should establish a rule that would lead to great fraud in the execution of composition-deeds. There is not the analogy which has been supposed between bankruptcy and compounding with creditors. In bankruptcy there is no concert or understanding between the creditors; the petitioning creditor acts on his own responsibility, and the other creditors are not influenced by any reliance on his judgment. The only question here, therefore, is, Whether, upon the terms of this deed, the other creditors were led to suppose that the Plaintiff had compounded for *all* his demands? Now,

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if every other creditor had the same mental reservation as the Plaintiff, of what use would such a deed of composition be to the debtor? The deed specifies, "all and all manner of claims and demands which we, or any or either of us may have, sue for, claim, challenge, or demand of, from, or against the said *Henry Hughes*, for or on account of any debt, claim, or demand of us, or any or either of us, in respect of any security, account, or reckoning now standing or being between us, or any or either of us, with or against the said *Henry Hughes*." — Does not that mean, all the debts of all the creditors who signed the deed? It is impossible to say that it does not; and the use of the schedule is, not to enable, but to prevent the Plaintiff from bringing forward at a future time other claims besides those specified in the deed. If such a reservation could be made with the consent of the debtor, it would be a fraud on the other creditors, as calculated to mislead their judgment; if, without the consent of the debtor, it would be a fraud against him also. Language more operative than that employed in this deed, to release every kind of debt, could not have been employed. But the main ground on which we decide, is, that if reservations like this be allowed, no man again will agree to a deed of composition. Such transactions are necessarily *uberrimæ fidei*, and no engagement can stand which has been withheld from the knowledge of the whole body of the creditors, and which it would have been material for them to know.

PARK J. I am of the same opinion, and have never entertained any doubt on the point; indeed, if the facts had been understood, I doubt whether the rule *nisi* would have been granted. Courts of law are never better employed than in supporting the rules of morality; and, in *Jackson v. Duchaire* (a), Lord Kenyon was

(a) 3 T. R. 551.

clearly

clearly of opinion that the plaintiff was not entitled to recover, upon the ground that the private agreement between the plaintiff and defendant was a fraud upon a third person, who had paid a less sum in advancement of the defendant, in confidence that the sum so paid by him was the whole consideration due to the plaintiff. From that time to the present the decisions have all coincided, and if we were to put on this deed the construction contended for, we should be adopting all the frippery instead of the substance of special pleading; for the object of this deed is express, that the Defendant should go clear of his debts; and though, perhaps, there might have been an understanding with the Plaintiff, to support it would lead to infinite fraud, and open the floodgates of misery on poor debtors.

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BURROUGH J. I think the nonsuit was perfectly right. We should be very strict in the construction of deeds of this kind, which are executed on the supposition of the creditors all standing on the same footing. The creditors here all meant to release the Defendant, and the very exception specified in the deed shews that no other exception ought to be implied. There is nothing in the deed to narrow the construction of the general terms; the Defendant was to be made a free man; and the deed given in evidence is conclusive against the Plaintiffs.

GASELEE J. Although I do not concur in the decision pronounced by the Court, I am not sorry for the conclusion at which they have arrived, because the rule they have laid down is sound and beneficial, and likely to prevent fraud in compositions; and if this question had now been raised for the first time, I should have concurred with them, but I doubt whether the conclusion they have come to is warranted by previous authorities.

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rities. *Holmer v. Viner* is undoubtedly like the present case; but there the defendant had given up all his property, which the present Defendant has not done, nor even given security for the whole amount of the sum to be paid under the composition. In *Leicester v. Rose* there was a private stipulation that the plaintiff should have collateral security for the whole of his demand, which was a fraud on the debtor himself. All the other cases are distinguishable from the present, except *Payler v. Homersham*, which appears to me directly in point, and to be overruled by the present decision. There a release contained in a deed, (which recited that defendant stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take of defendant 15s. in the pound upon the whole of their respective debts,) whereby the creditors, in consideration of the said 15s. in the pound paid to them before executing the release, "each and every of them, did release defendant from all manner of actions, debts, claims, and demands, in law and equity, which they or any or either had against him, or *thereafter could, should, or might have*, by reason of any thing from the beginning of the world to the date of release," was held to release nothing but the respective debts set opposite the creditors' names, and all actions and demands touching them. And the broad principle laid down was, that the general words in a deed of release have reference to the particular recital, and shall be governed by it. This deed, by the list attached, clearly specifies the debts to which it was intended to be applied; and the words of general release in *Payler v. Homersham* are not more extensive than those employed here.

Rule discharged.

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DOE dem. EDWARD SOUTHOUSE Clerk, v. JENKINS
and Another.

May 15.

THIS was an action of ejectment brought to recover two undivided third parts of certain messuages, vaults, yards, and premises in *Southouse Court*, otherwise *Edward's Court*, in the parish of *St. Martin in the Fields*, in the county of *Middlesex*.

The cause came on to be tried before *Burrough J.*, at the sittings at *Westminster* after *Trinity* term 1828, when a verdict was found for the lessor of the Plaintiff, subject to the opinion of the Court upon the following case : —

Henry Southouse being seised in fee (*inter alia*) of the freehold part of a messuage in the *Strand*, in the county of *Middlesex*, then called the *Sun Tavern*, (whereof the messuages and premises in question, or the land on which the same were situate, were at that time parcel,) by his last will and testament, bearing date the 3d day of *November* 1743, and properly executed and attested so as to pass real estates, after devising to his son *Thomas Southouse* certain lands and tenements not in question in this cause, proceeded to devise as follows : “ I give and devise to my son *Thomas Southouse*, lately in the possession of *Watkin*, or *Mrs. May*, now *Mrs. Hayes*, the *Sun Tavern*, in the *Strand*, in the parish of *St. Martin in the Fields*, in the county of *Middlesex*, for and during his natural life. I do give and devise to my said son *Thomas Southouse* all those two farms, &c. at *Ravensdon*, in *Bedfordshire*, for and during his natural life. But whosoever shall be in possession of the said lands at *Ravensdon*, and all the aforesaid premises so

1. Where by a very obscure and illiterate will, property was left to deviser's four grandsons,

“ and to the heirs males of the said grandsons, and then to the grandsons' heirs males that part that belonged to their father, and then to the last liver to the heirs males of the said grandsons, and for want of issues males of the grandsons,” over ; the Court implied cross remainders.

2. The heir in tail received for ten years rent under a lease for ninety-nine years granted by his ancestor : Held, a confirmation of the lease.

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given by me to my said son *Thomas Southouse*, I charge on it a rent or an annuity of 40*l. per annum*, to be paid to my daughter *Ann Pellatt*, for and during her natural life, and an annuity of 40*l. per annum* to be paid to my daughter *Elizabeth Parker*, for and during her natural life." And in another part of the said will as follows: "And from and after the decease of the said *Thomas Southouse*, I give and devise the said farms at *Ravensdon*, &c., and my houses in the occupation of the late *Watkins* and *Mrs. May*, now *Mrs. Hayes*, to the first son of the body of the said *Thomas Southouse*, lawfully begotten, and his heirs male of the body of such first son lawfully issuing, and for default of such issue, to the second, third, and fourth, and all and every other the son and sons of the body of my said son *Thomas Southouse*, severally and successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and the several heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body issuing being always preferred, and to take before the younger of such sons and the heirs male of his and their body and bodies issuing. I give and devise part of the said messuage and premises unto my son *Samuel Southouse* for his life, and to his heirs males of his body, after the decease of my son *Thomas Southouse* and his heirs males, viz. my farms at *Upminster*, &c. and the *Sun Tavern*, late *Mrs. Hayes*, in the *Strand*, in *St. Martin's in the Fields*; and for want of issue males of my son *Thomas* and my son *Samuel Southouse*, after their decease I give the aforesaid farm at *Upminster*, &c., and the *Sun Tavern*, I give and devise them to my son *Edward's* four sons, to *Henry Southouse*, to *Edward Southouse*, to *Thomas Southouse*, and to *William Southouse*, my four grandsons. And I do further give to my four grandsons as above, after the
decease

decease of my son *Thomas Southouse* and his heirs males, all my farms, &c. at *Ravensdon*, in *Bedfordshire*. And I do hereby order to be paid out of the premises as is before given to my son *Samuel Southouse* and his heirs males, and also my four above grandsons, out of their premises, in proportion to the value of the several rents, to pay certain annuities mentioned in the will; and then, after the decease of my son *Thomas Southouse*, and his heirs males, and after the decease of my son *Samuel Southouse*, and his heirs males, then I give all the above said farms, and premises, and messuages, to my above said four grandsons, they to have share and share all alike of all the aforesaid premises. And then I give to the heirs males of all my said grandsons, and then to go to my grandsons' heirs males, that part that belonged to their father, and then to them, and then to the last liver to their heirs males of my said grandsons; and for want of issues males of my grandsons, I give my grandson *Henry Southouse*, son of my son *Henry Southouse*, and to his heirs males of his body lawfully to be begotten. And for default of such issue male, to my nephew *William Southouse*, and his heirs males, and to my grandson, *Edward Parker*, his heirs males, and for want of such issue male, I will that the same remain to my own right heirs for ever."

The said testator from the time of making his said will until and at the time of his decease, remained seised as aforesaid of the said freehold part of the *Sun Tavern*, and died in or about *March 1744*, being survived by his said sons *Thomas* and *Samuel*, and by his four grandsons *Henry*, *Edward*, *Thomas*, and *William*.

In or about the year 1779, *Thomas*, one of the said four grandsons of the testator, died, leaving no issue male.

In or about the same year, *William*, another of the said grandsons died, leaving issue male of his body lawfully begotten, only two sons, *Edward* and *John Carr*.

In

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In 1789, the said *Thomas* and *Samuel*, sons of the testator, were both deceased without issue male.

On the 29th of *September* 1790, by indenture of that date between *Edward Southouse*, one of the said grandsons of the testator, and *Charles Southouse*, eldest son lawfully begotten of the last-mentioned *Edward* (and described as his eldest son and heir in the said indenture) of the one part, and the said *Edward Southouse*, son of the said *William*, deceased, of the other part, the said parties of the first part did demise unto the said party of the second part one undivided third part or share of the freehold part of the *Sun Tavern*, being the same messuage or tenement in the said will described as the *Sun Tavern* (then in the occupation of the said lessee or his under-tenants), to hold the same unto the said lessee from the day of the date of the indenture, for the term of ninety-nine years thence next ensuing; yielding and paying unto the said lessor *Edward* and his assigns during his natural life, and after his decease, to the said lessor *Charles*, his heirs or assigns, the yearly rent of 9*l.*

On the same 29th *September* 1790, by indenture of the same date, between *Henry Southouse*, another of the said grandsons of the testator, and *Edmund Edward Southouse*, eldest son lawfully begotten of the said last-mentioned *Henry*, (and described as his eldest son and heir in the said last-mentioned indenture,) of the one part, and the said *Edward*, lessee in the first-mentioned indenture, of the other part, the said parties of the first part, did demise unto the said party of the second part, one undivided third part or share of the said freehold part of the *Sun Tavern*, then in the occupation of the said lessee or his undertenants, to hold the same unto the said lessee, from the day of the date of the said last-mentioned indenture, for the term of ninety-nine years, thence next, yielding and paying unto the said lessor *Henry*, and his assigns, during his natural life, and after his

his decease to the said lessor *Edmund Edward*, his heirs or assigns, the yearly rent of 6*l.* 18*s.* 4*d.*

Counterparts of the said leases were also duly executed and delivered to the respective lessors, and produced in evidence at the trial on the part of the lessor of the plaintiff.

In 1793, the said *Henry Southouse*, grandson of the testator and lessor in the said indenture secondly mentioned, died, and was survived by the said *Edmund Edward*, his co-lessor and only issue male.

In 1794, the said *Charles Southouse*, lessor in the first-mentioned indenture, died without issue.

In 1799, the said *Edward Southouse*, lessee in the said indentures, and his said brother *John Carr*, were both deceased without issue.

In *September* 1810, the said *Edward Southouse*, grandson of the testator and lessor in the said first-mentioned indenture, died, and was survived by *Edward*, the lessor of the plaintiff, his son and heir at law.

In *February* 1812, the said *Edmund Edward*, lessor in the said indenture secondly mentioned, died without issue.

The defendant *Jenkins*, claimed possession of the said demised premises as assignee of the estate and interest of the said *Edward Southouse*, lessee under the said leases of 1790, and the Defendant *Woodhouse*, claimed possession of the same as assignee of a lease granted by the said last-mentioned *Edward* in *March* 1795, purporting to be a demise of the freehold part of the *Sun Tavern* for sixty-years, from *Christmas* 1794.

On the 31st *May* 1817, the lessor of the Plaintiff, wrote and sent a letter demanding rent, to *Thomas Roe*, then acting as attorney for the Defendant, and received for answer a letter from *Roe*, in which he stated fully the nature of the title of the lessor of the Plaintiff, and suggested a particular form of receipt.

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The lessor of the Plaintiff, from the date of Mr. *Roe's* letter till the giving of the notices thereafter mentioned, received from time to time from the defendant *Jenkins* the several rents reserved by the said several indentures of 1790; and after receiving the said letter from the said *Thomas Roe*, gave receipts for the said rents according to the form enclosed in that letter, the first of these receipts being for the whole rent that had become due since the title of the lessor of the Plaintiff accrued.

On the 23d *March* 1827, the lessor of the Plaintiff gave the Defendant *Jenkins* notices in due form, to quit the several premises demised by the said two several indentures of 1790 respectively.

And the Defendant *Jenkins* having refused to comply with such notices, the lessor of the Plaintiff, after the expiration of the periods in such notices limited, served the declaration in this action in *April* 1828, containing a demise by the lessor of the Plaintiff on the 2d of *April* 1828, with notices for the tenants to appear in *Easter* term following. And in that term, the Defendants having obtained leave to defend as landlords, entered into the usual rule to confess lease, entry, and ouster.


The jury found that the lessor of the Plaintiff had established his title, but that he had by his acts confirmed the said leases of 1790.

The question for the opinion of the Court was, whether the lessor of the Plaintiff was entitled to maintain this ejectment for the said two undivided third parts of the premises in question, or for either of them?

If the Court should be of opinion that he was entitled to maintain the same for both or for either of them, the verdict was to stand for the lessor of the Plaintiff accordingly. But if the Court should be of opinion that he was not entitled to maintain the same for either, then a nonsuit was to be entered.

Stephen

Stephen Serjt. for the lessor of the Plaintiff, contended that under the foregoing demise, he took one undivided third as issue in tail of the devisor's grandson *Edward*, and one undivided third as remainder-man in tail, under the will of *Henry Southouse*, the manifest object of the devisor being to make his four grandsons tenants in tail, with cross remainders between them. It was sufficient for the purpose of creating cross remainders, that the intention of the testator should appear to that effect, and the want of accurate expressions would not defeat his purpose. *Doe v. Webb* (a), *Watson v. Foxon* (b), *Dyer*, 309. b. *Cooper v. Jones* (c), *Holmes v. Meynel* (d), *Wright v. Holford* (e), *Atherton v. Pye* (f), 1 *Wms. Saund.* 135. n. b. For the third which he took as remainder-man, he was entitled to recover, because the lease for ninety-nine years by the preceding tenant in tail was void as against a remainder-man; for the third which he claimed as issue in tail, he was entitled to recover for the same reason, unless he had confirmed the lease granted by his predecessor; but notwithstanding the finding of the jury, that had never been done, because the confirmation rested on the receipt of rent, which took place when the party was ignorant of his title, and therefore was of no effect. *Per Lord Mansfield*, in *Jenkins v. Church* (g), *Doe v. Butcher* (h).

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Wilde and Adams Serjts. insisted that the finding of the jury was conclusive as to the confirmation, and warranted by the facts, as a party could not be supposed to have received rent ten years in ignorance of his title.

With respect to the cross remainder, admitting that

(a) 1 *Taunt.* 234.

(b) 2 *East*, 36.

(c) 3 *B. & A.* 425.


(d) *Sir T. Raymond*, 452.

(e) *Cowp.* 31.

(f) 4 *T. R.* 710.

(g) *Cowp.* 482.

(h) *Dougl.* 51.

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it was a question of intention, they argued, that no intention to create cross remainders could be collected from this will, but rather the contrary, since the testator had expressly devised to his grandsons "that part that belonged to their father," thereby impliedly excluding the part that belonged to an uncle.

Stephen was stopped in reply.

BEST C. J. In this case the father and the uncle of the lessor of the Plaintiff being seised in tail, each granted a lease for ninety-nine years of one-third of the premises sought to be recovered.

That granted by the father is only voidable by his issue in tail, and not absolutely void. It might, therefore, be confirmed by the lessor of the Plaintiff.

Whether he confirmed was a question of fact, and the jury have found he did. It is said, indeed, this was in ignorance of his title; but he ought to have informed himself, and if he omitted to do so, can take no advantage of his own neglect. With respect to the other third, the lease was altogether void, as against the lessor of the Plaintiff, supposing there were cross remainders between him and the other devisors.

Enough may be collected from this will to shew, that the testator did not intend that any part of his property should go over till all the issue of his grandsons had failed; and the question has been properly put on the simple ground of intention.

In the midst of all the darkness of this illiterate will, we can grope our way, and though what is meant by "to the last liver," is not very intelligible, there are the words "for want of issue male of any grandson." Therefore, nothing could go over till all that issue was extinct.

PARK

PARK J. It is almost absurd to say that the lessor of the Plaintiff was ignorant of his title. If the property was valuable, as it perhaps is, he would of course enquire into the title. This applies only to one third. As to the other, the question is, Whether an intention can be collected to create cross-remainders? The language of the devise over is the material thing, and from that such an intention may sufficiently be collected.

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BURROUGH J. and GASELEE J. concurred.

Judgment for the lessor of the Plaintiff as to one third.

GARNER v. SHELLEY and Others.

May 19.

THIS was an action of *assumpsit*, in which the declaration contained counts for money had and received by the Defendants to and for the use of the Plaintiff, and for money due upon an account stated between them.

By the rules of a friendly society, a medical attendant was entitled to 3s. *per annum* from every member; and a committee of the society were authorised to settle

The cause came on for trial at the last *Stafford* assizes, when the jury found a verdict for the Plaintiff, with 15*l.* 9*s.* damages, subject to the opinion of the Court upon the following case: —

all disputes, grievances, &c. relative to the affairs of the society, subject to an appeal to two magistrates.

The Plaintiff, who had been duly appointed medical attendant, was dismissed by the committee without any meeting of the members of the society at large, and another appointed. Upon an application to magistrates, they recommended a public meeting; which being convened accordingly, a large majority of the members voted for the Plaintiff, who thereupon sued the Defendant, the treasurer, for the 3*s.* received to the use of the medical attendant:

Held, that the Plaintiff was entitled to recover, and that the Defendant was not exonerated by an order of the committee not to pay.

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The Plaintiff was a surgeon and apothecary. In the year 1821, a friendly society was established at *Yoxall*, subject to certain rules, orders, and regulations, which were in due manner allowed, confirmed, and approved by justices of the peace assembled at a general quarter sessions of the peace; and the said rules, orders, and regulations, as well as the tables of the said society, were deposited with the clerk of the peace, and enrolled at the same sessions. Among the said rules, orders, and regulations, were the following; *viz.*,

1st. That the society was established for the purpose of raising by subscription from the several members thereof, and by voluntary contributions, a stock or fund for their mutual relief and maintenance in old age, sickness, and infirmity, and for the benefit of the widows and representatives of deceased members in certain cases, and for no other purposes whatsoever.

2d. That twelve discreet and intelligent persons, members of that society, should be annually chosen as a committee, which committee, or any five of them, including the stewards or their proxies, should have the power to enquire into, settle, and determine all grievances, differences, and disputes whatsoever, which might or should arise relative to the affairs of the society, save and except that the parties aggrieved might appeal to any two magistrates, as empowered by the acts relating to friendly societies. The committee, under the control of the high and deputy stewards, should have power to lend and dispose of the society's money at interest, in such way and manner, and in such sums as they believed to be most advantageous to the society, taking good and proper security for the same. The old committee should nominate and appoint the persons composing the new one, and six of them at least should be annually changed by ballot immediately after the
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new committee was chosen and formed. They the said committee should agree upon and appoint three sufficient, discreet, and intelligent persons among the twelve composing such committee to act as stewards, the one as high steward, the other two as deputy-stewards, to assist and help him the said high steward in the execution of his office. The high steward, in all matters of dispute or disagreement, either in the committee or society at large, should always have the power and privilege of the casting voice; and if he should find it requisite to consider further the subject under discussion or in dispute, should, for that purpose, be at liberty to withhold his determination for the space of one month or twenty-eight days, provided the subject would admit of such delay. The three stewards should give their joint bond to the society for the stock entrusted to their care and disposal; they should make up their accounts, and deliver up every thing belonging to the society to the succeeding stewards the next club-night after their being appointed, or forfeit 10*l.*; and no action or suit whatsoever should be commenced without the approbation and consent of the committee, or the major part of them, the high steward having in that case, as in all other cases, the privilege of the casting vote.

16th. That each member should pay 3*s.* annually to the society's doctor, in consideration of which, in case of sickness or lameness, he should be entitled to the necessary medicines and attendance his situation might require: every member to pay the doctor whether in or out of his limits, provided he resided not more than five statute-miles from *Yorall*, and the first payment should become due on the 19th *March* 1822.

By the 23d, three stewards, whose names were therein mentioned, were appointed.

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When the society was established in 1821, the Plaintiff was duly appointed the doctor to the society, and continued to fill that situation without any interruption till the month of *August* 1826; but, before that time, complaints of his negligence and misconduct as such doctor had been made by different members of the society to the high steward, and to some of the members of the committee.

On the 14th *August* 1826, a meeting of the committee was held, at which eleven members attended. No notice of that meeting was given to the Plaintiff. After the committee had assembled, the Plaintiff was sent for, but was not at home, and did not attend. A Mr. *Fernyhough* was also sent for. At this meeting the complaints against the Plaintiff were discussed, but no evidence was given of the facts, and a vote of his dismissal, and the appointment of Mr. *Fernyhough*, was carried. Eight persons voted for *Fernyhough*, and two for the Plaintiff.

The following was a copy of the resolution of the committee : —


“ Resolved, that Mr. *John Garner*, the surgeon and apothecary of the society, be henceforth dismissed from that office, and that Mr. *Joseph Fernyhough*, surgeon and apothecary, be appointed to succeed him, and a proper proportion only of the members' subscription to the surgeon and apothecary be paid to the said *John Garner* for the period he has acted as such during the present year to this time, and that the remainder of such subscription be paid to the said *Joseph Fernyhough*. Also ordered, that a copy of the following notice be delivered to Mr. *Garner* forthwith.”

“ Sir, — You are hereby informed, that the committee of the *Yoxall* New Friendly Society having met this day to consider the propriety of continuing you as
surgeon

surgeon to the society, it is agreed, that your services shall cease from this day. I remain, for the deputy-stewards and committee,

“Yours, &c.

“JOHN JACKSON.”

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A copy of such notice was delivered to the Plaintiff on the same or on the following day. The proportion of the members' subscription up to that time was paid to the said Plaintiff, who did not, however, acquiesce in the dismissal, but did continually from thence attend as many of the members of the society as would permit him to do so, amounting to more than the majority; and seventy-five of them, the whole number being from 100 to 110, signed a paper approving of him as the doctor.

The Judge left it to the jury to say, whether the proceedings of the committee were *bonâ fide* for the investigation of the complaints, or merely for the purpose of getting rid of the Plaintiff, and appointing another medical man. The jury found the latter, and said the Plaintiff was an injured man. The Plaintiff had been and was then a member of the society.

The Defendants, on the 19th *March* 1827, were elected stewards of the society, and continued to act as such till the month of *May* 1828; and in the early part of that year received from each of the several members of the society, according to the usual course, the sum of 3s. for their respective payments to the society's doctor, under the sixteenth rule, for one year ending 19th *March* 1828, which sums amounted to 15*l.* 9s. Upon the 11th *March* 1828, the following order was made by the committee, and entered upon the books of the society:—“At a meeting of the stewards and committee of the *Yoxall* New Friendly Society, held at the *Golden Cup Inn*, in *Yoxall*, this 11th day of *March*

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1828, *ordered*, that the sum of 15*l.* 12*s.* be paid to Mr. *Joseph Fernyhough*, surgeon and apothecary to the said society, that sum being the amount due to him for medicines and attendance for and on the sick and lame members thereof, we, the undersigned stewards and committee of the society aforesaid, considering the said Mr. *Joseph Fernyhough* the legally-appointed surgeon and apothecary to such society; and we also further ratify and confirm his appointment to the said office. As witness our hands."

This was signed by the high steward and ten others, members of the society.

Disputes having arisen respecting the aforesaid vote of dismissal of the Plaintiff, the committee (including the present Defendants), and many members of the society, attended before two of the justices of the peace of the county of *Stafford*.

It was denied on the part of the Defendants, that the magistrates had authority, under the statutes, to settle the matter themselves or make any order respecting it; but, upon their recommendation, a public meeting of the said society was held on the 17th *December* 1827, of which the following notice was given: —

"*Yorall New Friendly Society, December 6. 1827.*

"It having been agreed, in pursuance of the recommendation of the magistrates at their meeting at *Whichnor Bridges* on *Saturday* last, that the votes of the members should be taken at the next club meeting to be held on the 17th *December* instant, for a surgeon to the club, you are requested to attend to give your vote on that occasion."

The meeting was attended by the present Defendants, who were stewards, the rest of the committee, and by a very large majority of the members of the society; and at such meeting, fifty-three voted for *Garner*, eleven were neuter, and three voted for the rival surgeon.

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The Plaintiff, before the action was brought, demanded the money of the Defendants, who refused to pay him, alleging that the committee considered Mr. *Fernyhough* to be the legal doctor.

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The question for the opinion of the Court was, Whether the Plaintiff was entitled to recover from the said Defendants the said sum of 15*l.* 9*s.* above demanded, or any and what part thereof? If the Court should be of opinion that the Plaintiff was so entitled, the verdict was to stand for such sum as they should think fit; if not, a nonsuit was to be entered.

Spankie Serjt., for the Plaintiff, was stopped by the Court.

Russell Serjt. for the Defendants, contended, first, that under the second rule for settling all disputes, &c. the committee had the power to dismiss the doctor without the concurrence of the rest of the society, and that, if so, the Plaintiff, having been duly dismissed, was incompetent to maintain the present action;

And, secondly, that at all events, the Defendants, having acted under the orders of the committee in refusing to pay the Plaintiff, were not liable to be thus sued. The 59 G. 3. c. 128. s. 9. made the rules of the society binding, subject to an appeal under 33 G. 3. c. 54. s. 15.; and, after *Fernyhough* had been duly appointed, the Defendants would have no answer to an action by him for the very sum now claimed by the Plaintiff.

BEST C. J. I am of opinion that this action is maintainable. It does not appear that the matter in which the committee have taken upon themselves to decide, is a dispute or grievance which it was within their pro-

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vince to determine on; and the jury have found in effect, that they were not acting so much with a view to remedy a grievance, as to promote a job for bringing in as medical attendant a friend of some of the influential members. Then the parties go before a magistrate, a meeting is convened pursuant to his recommendation, and it is agreed, by a great majority of the society, that the Plaintiff shall be restored. After that, what had been done before, was undone. As to any claim of *Fernyhough*, if the defendants pay him, they will do so in their own wrong; but, at all events, paying the wrong person will not exonerate them from paying the right.

PARK J. concurred.

BURROUGH J. To have given any colour to the dismissal of the Plaintiff, there should have been a summons, evidence, and hearing. There is no proof that the dismissal was authorized, and our judgment must be for the Plaintiff.

GASELEE J. concurred.

Judgment for the Plaintiff.

1829.

J. EVANS v. WHYLE.

May 21.

THE Defendant guaranteed the Plaintiff, to the extent of 50*l.*, payment for any gold he might supply to *Evan Evans*, a working goldsmith, for the purpose of carrying on his business.

After supplying *Evan Evans* for some time, the Plaintiff, upon the application of *E. E.*, discounted certain bills of exchange for him, and furnished the amount of the bills, partly in money, and partly in gold, deducting from the gold the usual charge for credit for the length of time the bills had to run, and from the money, interest at the same rate. *Evan Evans* did not indorse the bills, but the gold was applied by him in the purposes of his business.

The bills having been dishonoured, the Plaintiff sued the Defendant on his guarantee. At the trial before *Best C. J.*, *London* sittings after *Hilary* term, it was objected, on the part of the Defendant, that the Plaintiff's gold, although applied by *E. E.* to the purposes of his business, was not sold by the Plaintiff to him for the carrying on of that business within the meaning of the guarantee, but was in effect part of the purchase-money paid by the Plaintiff for bills he had discounted, and which, having so purchased without *E. E.*'s indorsement, he had taken at his own risk.

The learned Chief Justice, however, thinking the transaction a supply of gold within the terms of the guarantee, a verdict was found for the Plaintiff; which

Wilde Serjt., upon the grounds urged at the trial, obtained a rule *nisi* to set aside.

Defendant guaranteed the payment of gold with which Plaintiff should supply a goldsmith for the purposes of his trade. Plaintiff discounted bills for the goldsmith, and gave him for them partly gold, and partly money: the gold was applied to the goldsmith's trade, but the goldsmith did not indorse the bills:

Held, that the Defendant was not liable under his guarantee for the gold so furnished.

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Taddy Serjt. shewed cause. The fact that the gold was applied in *E. E.*'s business, is conclusive to shew that the supply was within the meaning of the guarantee. *E. E.* was to be the original creditor: it was contemplated that credit should be given to him to the extent of 50*l.*; and the mode in which he should propose to make his payments in the first instance could not alter the nature of the transaction, or aggravate the Defendant's responsibility. Gold was to be furnished; *E. E.* was to pay for it if he could, and if not, the Defendant. The gold was furnished: *E. E.* attempted to pay for it by bills not due (allowing for the discount), and, those bills failing, the Defendant is liable. Gold was to be transferred by the Plaintiff to *E. E.* for value from *E. E.* or the Defendant: the transaction is the same in substance, whether the Plaintiff be called the purchaser of the bills with gold, or *E. E.* the purchaser of the gold with bills. At all events, the Plaintiff was to have the value of his goods secured to him; and, having failed to obtain it from *E. E.*, he is entitled to it from the Defendant under his guarantee.

It might have been otherwise if the gold had been taken, not for the purposes of trade, but merely to raise money; of that there was no evidence, and the fact of its having been employed in the trade negatives the supposition.

Wilde. Guarantees are to be construed strictly, and a mere surety is not to be made liable by any implied extension of the terms of his engagement.

Although the gold was applied in *E. E.*'s trade, there is a manifest distinction between one who supplies gold, trusting to the buyer for the payment of the value, and one who buys bills of exchange by discounting them, and looks for his profit solely to the parties liable on the bills. That the Plaintiff did so in this case is clear from

from his not requiring *E. E.*'s indorsement to the bills; and whether he paid for those bills by money, or gold, or goods, is perfectly indifferent: it is a transaction in which he is buying the bills at his own risk, and not one in which he is selling the money, or the gold, or the goods, on the credit of the person who takes them. If so, although it is a mode by which gold has been transferred for value from the Plaintiff to *E. E.*, it is not a mode within the terms or meaning of the guarantee.

In *Emly v. Lye* (a), where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker, it was holden, the latter had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills; though the proceeds were carried to the partnership account; the money having been advanced solely on the security of the parties whose names were on the bills by way of discount, and not by way of loan to the partnership; though the banker conceived at the time that all the bills were drawn on the partnership account. And in *Ex parte Isbester* (b), *A.*, the payee of a bill of exchange, indorsed it blank and delivered it to *B.*; *B.* wrote above the blank indorsement, pay *C.* or order; *B.* took up the bill after a commission of bankrupt had issued against the acceptor. His petition, that he might be at liberty to prove it under the commission, was dismissed. So that here is clearly no *debt* due from *E. E.* for gold sold, which was all the guarantee contemplated.

BEST C. J. The opinion which I entertained at the trial has been changed, and I think this rule ought to

(a) 15 *East*, 7.

(b) 1 *Rosc*, 21.

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be made absolute. This is an action on a guarantee, touching the sale of gold from the Plaintiff to *Evan Evans*; and it was understood between the parties, that the gold furnished to *Evan Evans* was to be used in his trade. The question which has arisen is, Whether gold advanced by the Plaintiff, together with money in discounting bills for *Evan Evans*, is gold supplied within the meaning of the guarantee? I think it is not. The Defendant only meant to pay for such gold as was *sold* to the original debtor: this was not sold by the Plaintiff, but paid on the purchase of bills of exchange, and the cases cited clearly establish the distinction between payment for goods by bills, and transferring bills when they are discounted. This, therefore, was not a transaction within the meaning of the guarantee, by which the Defendant was proposed to be responsible for gold sold to *Evan Evans* in the way of his trade. Guarantees ought to receive a strict construction; and they should be so drawn up as to embrace in terms the dealing intended to be guaranteed.

PARK J. The distinction is to be collected from the cases which have been cited. If a party sells goods, and takes for them a bill of exchange which is not honoured, he is remitted to his original consideration; but if he discount bills for money to one who does not even indorse them, it is a purchase of the bills at his own risk.

The rest of the Court concurred, and the rule for a new trial was made

Absolute.

1829.

TERRINGTON, Assignee of PULLAN, a Bankrupt,
v. HARGREAVES and Others.

May 22.

UPON an action by the Plaintiff, as assignee of *Pullan* a bankrupt, commenced in *Trinity* term 1827 against the Defendant for money had and received, the jury, at the trial before *Best* C. J., *London* sittings after last *Michaelmas* term, found the following special verdict: — That the said *Richard Pullan*, the bankrupt, on the 26th of *June*, in the year of our Lord 1822, was, and for some time before that day had been, a trader within the meaning of the bankrupt laws, at *Leeds*, in the county of *York*. That, on that day, he was indebted to the Plaintiff, *Richard Terrington*, the petitioning creditor, under the commission afterwards issued against him, in the sum of 1100*l.* and upwards. That being such trader, and being so indebted to the said *Richard Terrington*, afterwards, on the 26th day of *June* 1822, the said *Richard Pullan* became bankrupt within the true intent and meaning of the statutes then in force concerning bankrupts. That a commission of bankrupt was issued against him, dated the 15th day of *May* 1823, under which he was duly declared a bankrupt; and that the Plaintiff and *William White* (whom the Plaintiff hath survived) became and were assignees of the estate and effects of the said bankrupt, according to the force, form, and effect of the said statutes, and the said Plaintiff now is assignee of the said estate and effects. That the said *Richard Pullan* was insolvent in the month of *February* 1822, and remained so insolvent until the issuing of the said commission of bankrupt. That the said Defendants, on the 4th day of *August* 1822,

The bankrupt act, 6 G. 4. c. 16. s. 82., is retrospective.

Therefore, where the bankruptcy took place *June* 26. 1822, and the bankrupt paid the Defendant, who knew of his insolvency, a sum of money *August* 4. 1822, and a commission was sued out against the bankrupt in *May* 1823: Held, that the assignees could not, subsequently to the time when the 6 G. 4. c. 16. came into operation, sue the Defendant for money had and received.

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1822, received from the said *Richard Pullan* the sum of 165*l.* 7*s.* 6*d.*, being the first instalment of a debt due to them, for which they, with other creditors, had, on the 21st day of *March* preceding, agreed to take the said *Richard Pullan's* notes, payable at four, eight, twelve, and sixteen months. And that, at the time when they so received the said sum of 165*l.* 7*s.* 6*d.*, they knew that the said *Richard Pullan* was insolvent, but did not know that he had committed any act of bankruptcy.

Wilde Serjt. for the Plaintiff. With respect to payments made by a bankrupt after an act of bankruptcy, and before a commission sued out against him, the 6 G.4. c. 16. s. 82. is not retrospective, where, as in the present case, the commission was sued out before that act came into operation. Section 135. enacts, "That nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or upon or against any bankrupt against whom any commission has or shall have been issued, except as is herein specifically enacted." The assignees, under a commission sued out previous to the act, had an existing right at the time the act passed; and the cases in which it is specifically provided the act shall have a retrospective operation, as in sections 112. 123. 131., exclude the possibility of giving it such an operation in any cases not expressly provided for.

It is true, the expression "payments *made*," in s. 82., as contrasted with *hereafter to be made*, may seem of itself to have an express retrospective operation, as the Court appears to have thought in *Churchill v. Creese*. (a) But

(a) 5 *Bingh.* 130.

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when the word *made* in the eighty-second section is connected with the language of the 135th section, touching the validity of existing rights, it may be easily satisfied by confining it to cases where the payment has been made before the act came into operation, and the commission has been sued out, and the action in respect of the payment commenced, subsequently to the acts coming into operation. In such case, as the assignees under such subsequent commission would have had no existing right at the time the act came into operation, the word *made* in the eighty-second section might have its retrospective effect consistently with the provisions of s. 135., and with the general principle which precludes a law from having an *ex post facto* operation, unless where its terms are precise to that effect. But where the commission has been sued out, as well as the payment made, before the act came into operation, and the assignees under such commission will consequently have been in possession of any existing right to sue under the old law in respect of such payment, it will be a violation of the 135th section, and not in conformity with the eighty-second, to give it a retrospective effect.

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Merewether Serjt., *contra*, relied on *Churchill v. Crease*, contending that the word *made*, as contrasted with *hereafter to be made*, could only have a retrospective operation, and that the eighty-second section had made no distinction between the two classes of commissions in that respect.

BEST C. J. If I am in error, as this case is on a special verdict, my error may be set right, but I entertain still the opinion expressed in *Churchill v. Crease*, which cannot, I think, be distinguished from the present case. The point has been well argued. It has
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been contended on the one side, and conceded on the other, that the provisions of a statute cannot be retrospective unless declared to be so by express words. I accede to that position; but there are words in the eighty-second section which expressly render that section retrospective, and which have no meaning unless such a construction be adopted. An ingenious argument has been used, to shew that sense may be made of those words without giving them a retrospective operation under circumstances such as the present; and, if that could be done, I should agree in the conclusion which the counsel for the Plaintiff has attempted to establish; but the words of the section are, "that all payments really and *bonâ fide* made, or which shall hereafter be made, by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed." To what time does that relate? To the time of passing the act, or to the present time? In *Churchill v. Crease*, I am reported to have said, "Unless the expression, 'payments made,' refer to a period anterior to the passing of the act, the expression, 'hereafter to be made,' is altogether nugatory. It seems to me, therefore, that the legislature contemplated all payments actually made at the time the act came into operation." I think I must have been misunderstood, and that I could not have let fall such an expression; at all events, I did not intend, upon that occasion

occasion to say, that the expression *payments made* must be nugatory unless it referred to a period *anterior* to the passing of the act, but merely that the words, *payments made*, must apply to *some* time; that they could apply to no other time than that of passing the act; and, if so, must comprehend payments made before that time.

The section is not so clear as it might be, but it is not easy to put any other interpretation on it.

PARK J. *Payments made* must, according to the common meaning of the words, be construed retrospectively, and *hereafter to be made*, prospectively. I see no reason to alter the opinion I expressed in *Churchill v. Crease*.

BURROUGH J. *Made*, succeeded as it is by *hereafter to be made*, must mean, made before the act.

GASELEE J. concurred.

Judgment for the Plaintiff.

HOVILL v. STEPHENSON.

May 25.

THIS was an action upon a charter-party. At the trial before Park J., London sittings after Hilary term, it appeared that, after the execution of the instrument, the attesting witness was, by agreement with the Plaintiff, admitted to a share of the profits which the Plaintiff expected to arise from his bargain. An objection was taken to the competency of the witness, and his evidence was rejected, he having refused to release

Where the Plaintiff, in an action on a charter-party, had communicated to the attesting witness an interest in the adventure subsequently to the execution of

the instrument, Held, that evidence of his handwriting was inadmissible.

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his interest. It was then proposed to prove his handwriting. This proof was objected to, and the objection allowed by *Park J.*, who tried the cause. The Plaintiff, not being able to prove the charter-party, was nonsuited.

Taddy Serjt. obtained a rule *nisi* to set aside this nonsuit, on the ground that the evidence offered by the Plaintiff had been improperly rejected.

Wilde Serjt. shewed cause. The testimony of the attesting witness, and the evidence of his handwriting, were both properly excluded. It would be most mischievous if a party could be allowed to place in the box a witness to whom he himself had given an interest in the event of the cause; and it would be equally mischievous if, by mere proof of his handwriting, he could withdraw from interrogation a witness whom it might be material to his opponent to examine. A case such as the present does not fall within any of the exceptions which permit examination of an interested witness, or proof of his handwriting. As where, subsequently to the execution of the instrument, the witness becomes interested by operation of law; as by becoming executor or administrator. *Goss v. Tracey*. (a) In *Honeywood v. Peacock* (b), as the defendant knew of the situation in which the attesting witness stood, and yet desired him to attest, it was holden he should not afterwards be allowed to object to his testimony. But the general principle on which an attesting witness is excluded from giving testimony if interested, and proof of his handwriting is rejected, was established in *Swire v. Bell* (c), and has not been departed from. And in *Forrester v. Pigou* (d), the first underwriter upon a policy,

(a) 1 P. Wms. 287.

(b) 3 Campb. 196.

(c) 5 T. R. 371.

(d) 1 M. & S. 9.

who

who had paid the loss upon an understanding that he was to be repaid in the event of the action against another underwriter failing, was held an incompetent witness.

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Taddy. The original object of calling the attesting witness was, not so much to shew the circumstances attending the execution of the instrument, as the signature of the party executing. If the witness had been rendered interested with a view to giving him an improper bias, if there were any fraud in the transaction, that might be a ground for rejecting him, and proof of his handwriting. But here the Plaintiff concealed nothing, and fraud was never imputed. To exclude all proof of the deed under such circumstances could answer no good purpose, and must work great injustice. If proof of the witness's handwriting may be admitted where he becomes a general partner with the party suing, it is not easy to say why it should not be admitted, when he becomes partner only in the particular adventure, inasmuch as his interest in the latter case is only a fraction of his interest in the former.

In *Godfrey v. Norris* (a), where the attesting witness to a bond sued as administrator to the obligee, no distinction was made as to the source whence the interest proceeded, although it was urged that he might have permitted another to take out administration: and proof of his handwriting was admitted. And in *Buckley v. Smith* (b), proof of the attesting witness's handwriting was admitted, although it was clearly by act of the party that she had become interested, for the plaintiff had married her. *Swire v. Bell* turned on the circumstance that the witness was interested at the time of the execution of the deed, as well as at the time of the trial.

Cur. adv. vult.

(a) 1 Str. 34.

(b) 2 Esp. 697.

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BEST C. J. This is an action upon a charter-party. After the execution of the instrument, the attesting witness was, by agreement with the Plaintiff admitted to a share of the profits which the Plaintiff expected to derive from his bargain. An objection was taken to the competency of the witness, and his evidence was rejected, he having refused to release his interest. It was then proposed to prove his handwriting: this proof was objected to, and the objection allowed by my brother *Park*, who tried the cause. The Plaintiff, not being able to prove the charter-party, was nonsuited.

A motion has been made to set aside this nonsuit. My brother *Burrough* was absent when this case was argued, but the rest of the Court are of opinion that this evidence was properly rejected.

There are many cases where a subscribing witness has acquired an interest after the execution of the instrument attested by him, in which it has been decided that proof of his handwriting may be received to establish such instrument.

The handwriting of a subscribing witness who has been appointed an executor or administrator, or has married the person to whom the instrument was given, has been allowed to be proved. We do not dispute the authority of any of those decisions; on the contrary, we should be disposed to extend the principle established by them to the case of a man entering into a partnership, and becoming interested in instruments by acquiring a share in the credits, and taking upon himself the responsibilities of the firm of which he becomes a member.

Necessity requires that, in all these cases, such evidence should be received, as otherwise parties must lose the rights secured by the instruments attested, or forego accepting of situations most important to their welfare.

It would be a hard thing, if the law were to say that a man should not become an executor or administrator, or
accept

accept a beneficial partnership, without giving up debts due to the estates in which he has acquired an interest. But, in the present case, the witness has only obtained an interest in the contract which he was to prove, and that interest he derived immediately from the Plaintiff, who proposed to call him. The Plaintiff cannot complain that his witness is disqualified, when he himself has been the cause of his disqualification.

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That the interest was considered by the witness to be so valuable as to be likely to affect his testimony, is proved by the circumstance, that he refused to release it. It would be improper to allow a plaintiff to give such an interest to a person, in the particular transaction in which he is obliged to call him as a witness, as is likely to bias his testimony.

A learned writer (who has devoted too much of his time to the theory of jurisprudence, to know much of the practical consequences of the doctrines he has published to the world,) has said, that interest should only operate against the credit, and not be an objection to the competency of a witness. This doctrine is, however, contrary to our law; for, according to that law, a direct interest to the smallest amount in any person, will prevent such person from being examined as a witness.

This rule does not stand upon the principle that Mr. *Starkie* supposes, viz. that the law can make no distinction between the degrees of interest; but upon this, that if the party declines releasing his interest, whatever may be its amount, it seems that he feels it of importance to him, and therefore cannot be trusted as a witness in a suit instituted for the recovery of it. A feeling of interest will, in spite of the utmost efforts of the most conscientious man, often so warp his memory, as to prevent him giving an accurate account of any transaction in which he is concerned.

Considering the interest of parties, and that which is

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of still more importance — the interests of the public and of religion, which require that every possible means should be used to prevent false evidence, the law cannot be too strict in excluding the testimony of interested witnesses. It is true that prejudices will often influence the mind of a witness as much as interest; but this is an evil that cannot be remedied. If we want the testimony of witnesses, we must be content to take it with all the defects that the infirmities of those who give it may occasion. We may require a witness to release his interest, but we cannot compel him to release himself from his prejudices. Because we cannot do all we wish, we should not fail to do all we can to get at truth.

The case of *Forrester v. Pigou* is stronger than the present. The plaintiff in that case gave the witness an interest after the cause of action accrued, without the privity of the defendant, and yet the Court would not allow the defendant to call him. If a plaintiff in such a case as this had a right to say, you must either allow me to call a witness whom I have rendered interested to support my claim, or allow me to prove his handwriting, you put a defendant under the necessity of having a case proved against him by an interested witness, or giving up the opportunity of obtaining a knowledge of any circumstances that occurred at the time of the execution of the instrument by the cross-examination of the attesting witness.

Let the rule for setting aside the nonsuit be discharged.

Rule discharged accordingly.

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KNOWLES v. BLAKE and THOMAS.

May 30.

RESCUE. At the trial before *Garro* B., last *Sussex* assizes, it appeared that the Plaintiff's son, having seen the Defendant *Blake*'s horses trespassing in his father's field, was in the act of driving them to the pound, when he left them for the purpose of apprizing the Defendant *Blake* of what had happened.

While he was out of sight on this errand, the horses strayed from the Plaintiff's field into the Defendant *Blake*'s shrubbery, where they remained nearly half an hour; at the expiration of which time, the Plaintiff's son, having failed to obtain redress from *Blake*, drove the horses out of the shrubbery into the Plaintiff's yard, whence they were shortly afterwards rescued by the Defendants.

Thomas suffered judgment by default.

It was objected that here was no rescue, because the distress had been abandoned by the Plaintiff's son's allowing the cattle to escape into and remain in the shrubbery, whence he had no right to remove them.

A verdict was found for the Plaintiff, subject to a motion to set it aside.

Cross Serjt. accordingly moved to set aside the verdict, and enter a verdict for the Defendant instead.

He contended, that there had been no sufficient distress of the horses in the first instance, no declaration of any intention to distrain having been made at the time; but if there had been a distress, it was abandoned when the horses were permitted to escape into and remain in *Blake*'s shrubbery; and the second caption being a

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trespass,

Plaintiff distrained Defendant's cattle damage-feasant, and went to apprise Defendant: during his absence the cattle escaped for half an hour into Defendant's ground, whence Plaintiff, on his return, drove them to his own yard: Defendant having taken them thence,
Held, no rescue.

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trespass, the Defendants had not been guilty of rescue. According to Lord Coke (a), "If the cattle themselves, after the view, go out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distress, then cannot the lord distrain out of his fee, and if he doth, the tenant may make *rescous*."

Andrews Serjt, contra. No precise form of words is necessary for a distress. It is sufficient if the intent to distrain be manifest. *Clement v. Milner*. (b) [*Best C. J.* That point was decided in *Wood v. Nunn*. (c)] Then, "if the tenant or any other, to prevent the lord to distreyne, drive the cattle out of the fee of the lord into some place out of his fee; yet may the lord freshly follow, and distreyne the cattle, and the tenant cannot make *rescous*, albeit the place wherein the distress is taken, is out of his fee." (d)

Where the distrainer only leaves the cattle in order to apprize their owner of the distress, and they escape during his absence, he must be taken to follow freshly, if he proceed with the distress immediately on his return.

Cur. adv. vult.

BEST C. J. Two questions have been raised in this cause. Upon the first, we all think that the distress was sufficiently made, for no precise act or form of words is essential to a distress. But distress is a matter of strict right; and if he who distrains, damage-feasant, permits the cattle to escape, he must look for some other remedy. A mere escape for an instant, indeed, if the distrainer followed, would not be an abandonment of the distress; for Lord Coke says, "When a man

(a) *Co. Lit.* 161 a.
 (b) 3 *Esp. N. P. C.* 95.

(c) 5 *Bingb.* 10.
 (d) *Co. Lit.* 161 a.

hath taken a distresse, and the cattle distreyned as he is driving of them to the pownd go into the house of the owner, if he that took the distresse demand them of the owner, and he deliver them not, this is a *rescous* in law." (a) But here the Plaintiff's son permitted the horses to stay in the Defendant's shrubbery for half an hour: they were not demanded during that time; and that was an abandonment of the right of freshly following. Lord Coke says, "If the cattle of themselves after the view go out of the fee, then cannot the lord distreyn them." (b) And in *Vasper v. Eddows* (c), Lord Holt says, "If a distress for damage-feasant dies in pound, or escapes, the party shall not distrain *de novo*; but if it were for rent, in either case, he may distrain *de novo*." The present is a stronger case than that, for the cattle taken had never been in the pound. Therefore, our judgment must be for the Defendant Blake.

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Judgment accordingly.

(a) *Co. Lit.* 161 a.(b) *Ibid.*(c) *Holt*, 257.

ARMITAGE v. BERRY and Another.

May 30.

THE Plaintiff sued on the following promissory note signed by the Defendants: "On demand we promise to pay *J. Armitage*, or order, 100*l.*"

The note had a 3*s.* 6*d.* stamp. By the 55 G. 3. c. 184. *sched. part 1.*, "a promissory note for the payment in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight,"

A note for 100*l.*, payable to *A. B.* or order on demand, is subject only to a stamp of 3*s.* 6*d.*

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BERRY.

sight," of 100*l.*, — is liable to a stamp of 3*s.* 6*d.*, and is not to be re-issued.

A "promissory note for the payment to the *bearer on demand*" of 100*l.* — is liable to a stamp of 8*s.* 6*d.*, and may be re-issued as often as shall be thought fit.

A verdict having been found for the Plaintiff,

Jones Serjt. moved to set it aside and enter a nonsuit, on the ground that the note ought to have had a stamp of 8*s.* 6*d.*; and he insisted that "payable to *order on demand*" was in effect the same thing as "payable to *bearer on demand*" — an indorsement in blank making the note payable to the bearer; and it having been decided that a promissory note payable to *A. B.* on demand (without the words either *bearer* or *order*) was a promissory note payable to *bearer* on demand, within the meaning of the above act. *Keates v. Whieldon.* (a)
But

The Court were clearly of opinion, that the note being payable to *order* on demand, fell within the description of those payable "in other manner than to the *bearer* on demand;" and the rule was

Refused.

(a) 8 B. & C. 7.

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EVERETT v. DESBOROUGH.

May 27.

ASSUMPSIT on a policy of insurance, effected for the Plaintiff on the life of *James House* with the *Atlas Insurance Company*, of which the Defendant was the secretary.

By the policy, certain conditions on the back of it were declared to be a part of the policy as much as if they had been repeated in the body of it.

These conditions were as follow, in two columns: —

Column the first; —

“ Conditions of Life Assurance.

“ Persons proposing to effect Life Assurance, will be required to state the following particulars; viz.

“ 1. Name and residence of the party by whom the proposal is made.

“ 2. Name, residence, and profession of the person whose life is to be assured; and, in case of an assurance upon survivorship, the name, residence, and profession of each party.

“ 3. Place and date of birth; and age next birth-day.

“ 4. Sum to be assured, and the term.

“ 5. Whether afflicted with gout, asthma, fits, spitting of blood, or any other disorder which tends to shorten life.

“ 6. Whether the party has had either the small-pox or cow-pox.

“ 7. Whether the party will attend personally, either

was requisite. The agent knew *H.* well, and made the usual enquiries. One of the terms of the contract was, a reference to the usual medical attendant of the life insured.

H. having given a false reference: Held, that the Plaintiff could not recover.

at

1. In an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements, and must suffer if they are false, although he is unacquainted with the life insured, and the servant of the insurance-office undertakes to do all that is required by his office.
2. Plaintiff effecting an insurance on the life of *H.*, with whom he was unacquainted, desired the agent of the insurance-office to do all that

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at the office in *London*, or before one of the company's agents.

“ 8. Whether employed in the military or naval service.

“ 9. Names and residences of two gentlemen to be referred to, respecting the present and general state of health of the life to be assured. *One to be the usual medical attendant of the party.*

“ A declaration as to all the above points will be considered as the basis of the contract between the assured and the company. If such a declaration be not in all respects true, the policy will become void, and the premium that may have been paid will be forfeited.”

Column the second; —

“ 10. No assurance to be in force until the *premium* has been paid; nor will any policy be considered valid for more than fifteen days after the expiration of the period limited therein, unless the premium, conditioned for the renewal of such policy, shall have been paid within that period, and the printed form of office-receipt given. But such assurances may be revived at any period, not exceeding three months after their expiration, on satisfactory proof being given to the directors of the unimpaired state of the health of the life assured, and on payment of the premium, with an addition of 5s. for every 100*l.* assured.

“ 11. Policies will become void if the parties, whose lives have been assured, shall go beyond the limits of *Europe*, or shall die on the high seas, (except in passing, during peace, in king's ships or packet or passage vessels from any one part of the United Kingdom of *Great Britain* and *Ireland* to any other part thereof; or in passing direct, by a similar conveyance, from and to any port in *Great Britain*, to and from any port between *Rotterdam* and *Brest*, both inclusive, or to and from *Guernsey*, *Jersey*, *Alderney*, or *Sark*;) unless special permission

mission shall have been granted by the directors, which may be obtained on the parties attending personally at the office, to give every requisite explanation, and paying such extra premium as the directors may deem adequate to the risk incurred.

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“ 12. Policies will also be void if the parties, whose lives have been assured, shall be actually employed in any military or naval service whatever.

“ 13. Assurances, made by persons on their own lives, will be void if they die by the hands of justice, by duelling, or by suicide. But should the families of such persons be left in distress and poverty, the directors, in their discretion, will make such allowance in respect of the policies of the deceased as they may deem just and reasonable.

“ 14. Assignments of life policies may be made without giving notice to the company.

“ 15. Persons effecting assurances on other lives than their own, will be required to state the nature of the interest they possess in such lives.

“ 16. All claims upon the company will be paid within three months after satisfactory proof shall have been produced of the death of the persons upon whose lives assurances have been effected.

“ 17. In cases of assurances in *Ireland*, the company undertake to appear in the courts of law there to any action commenced against them.

“ *London, 27th December 1825.*

“ By order of the Directors,

“ HENRY DESBOROUGH, Jun.

“ Secretary.”

The declaration in the cause stated, that the Plaintiff caused to be made a certain policy of assurance, whereby the *Atlas Company*, “relying on the truth of a certain declaration made by the Plaintiff *in compliance with the conditions on the policy* indorsed, (wherein it was declared that the age of *House* did not exceed forty-four years;

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years; that he had had the small-pox; had not had the gout; had not suffered a spitting of blood; and was not and had never been afflicted with asthma or fits, or with any disorder which tended to shorten life,) agreed, in consideration of a premium of 37*l.* 17*s.* 6*d.*, to pay him 1000*l.* in case *James House* should die within a year; provided that the policy should be subject to the printed conditions indorsed thereon, in the same manner as if the same were there actually repeated, and adapted to that present case." (a) And by those conditions it was expressed and declared, that persons proposing to effect life-insurance would be required to state the following particulars, &c.: (*inter alia*) the names and residences of two gentlemen to be referred to, respecting the present and general state of health of the life to be assured; one, *to be the usual medical attendant of the party*:—a declaration as to all the above points would be considered as the basis of the contract between the assured and the company. And the Plaintiff averred, that he did make a declaration according to the requisitions of the said printed conditions, and that the declaration so by him made, *and referred to in the policy*, was in all respects true. He then averred the death of *House*, and the Defendant's refusal to pay.

The Defendant pleaded the general issue; and paid the amount of the premium into Court, upon a count for money had and received.

At the trial before *Gaselee J.*, the following were the circumstances proved on the part of the Plaintiff:

The Plaintiff being known to possess some leasehold property, determinable on the life of *House*, was applied to by *Lye*, agent of the *Atlas Company* at *Warminster* (near which place the Plaintiff and *House* resided), to effect an insurance with the *Atlas Company*.

The Plaintiff agreed to insure 1000*l.*; but as he had

(a) The passage between inverted commas is the exact language of the body of the policy set out in the past tense.

never

never seen *House*, and knew nothing of him, he told *Lye* to make the requisite enquiries, and do all that was proper in the business.

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House, who at this time, and for six months preceding, had been residing with his mother, managing a farm of hers near *Warminster*, was a remarkably handsome athletic man, bearing all the external indications of rude health; and was believed by *Lye*, who had known him since his birth, and by all the inhabitants of *Warminster*, to be the healthiest and stoutest man of that healthy district. He bore a good character, and was, while residing there, of remarkably temperate and regular habits.

Lye called on him at his mother's, and at a house in *Bath* (sixteen miles off), where, previously to the last six months, he had resided for some years.

In answer to the enquiry "who was his usual medical attendant?" *House* said, "I have never had occasion for a doctor: sometimes I have taken *Harvey's* quack pills; but Mr. *Vicary*, of *Warminster*, knows as much of me as any man."

Mr. *Vicary*, a respectable and intelligent medical man, had never attended *House* professionally, but had known him from his birth, and had attended the rest of his family.

In a written communication made by him to the *Atlas* office, and in his testimony at the trial, he stated that he had never seen a stronger or healthier man.

Lye transmitted to the office a statement made by himself, in which, among other things, it was declared, that *House* referred to Mr. *Vicary* as his usual medical attendant. This statement occupied half the sheet of a letter, and was signed by *Lye*: *Lye* shewed this to the Plaintiff, and was beginning to read it over, when the Plaintiff said, "I dare say it is all correct;" and on the other half sheet the Plaintiff signed a separate declaration, that *House* had had the small-pox; had not had the

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the gout, &c.; was not afflicted with any disorder tending to shorten life; and that his age, residence, and occupation were as therein described.

On the part of the office it was proved, that *House*, when he resided at *Bath*, had been wont occasionally to indulge in extraordinary fits or bouts of intoxication. At these times he would be drunk day and night incessantly for ten days, a fortnight, or even three weeks, swallowing any thing and every thing that came in his way. He was always attended after these bouts by his neighbour *Harvey*, a quack doctor, who bled and purged him copiously. He went over to *Bath*, from his mother's, shortly before the insurance was effected, had one of these bouts, — recovered, — and died suddenly at his mother's, a few days afterwards.

These facts, however, and *Harvey's* attendance, were unknown to the Plaintiff, to *Lye*, and to the inhabitants of *Warminster* generally; and Mr. *Vicary*, the surgeon who examined *House* when the insurance was effected, asserted at the trial, that whatever his habits might have been, they had at the time of the insurance produced no perceptible effect upon his appearance or constitution.

On the part of the office it was contended, that these bouts of intoxication were a material circumstance, the non-disclosure of which avoided the policy; and that, at all events, it was a condition precedent to any liability on the part of the office that they should have been informed of the name of *House's* usual medical attendant; and that this condition had been neglected, *Harvey* having been his usual medical attendant, and not *Vicary*.

To this it was answered, first, that the Plaintiff's warranty was only against any *disorder* tending to shorten life; that he had not warranted against pernicious *habits*; that he could not be expected to disclose what he never knew; and that at all events it was sufficient if *House* was an insurable life at the time the insurance was effected.

Secondly,

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Secondly, that *House* was not the agent of the Plaintiff, who, therefore, ought not to be affected by misrepresentations, if any, made by him; and that though in ordinary cases the assured might be bound to furnish all the information required by the office, yet here, the Defendant's agent having solicited the insurance, and the Plaintiff having left it to him to make all the necessary enquiries, the office had taken the task of enquiry upon themselves, and had absolved the Plaintiff from the duties usually imposed upon the assured.

Gaselee J. left it to the jury to say, first, Whether at the time of effecting the insurance *House* was an insurable life; Secondly, Whether there had been a concealment of any circumstance which it was material for the office to know; and, thirdly, Whether *Lye* had acted as the agent of the Plaintiff, or of the office, or of both.

The jury found,

That *House* was an insurable life;

That there was no concealment of any material circumstance; and

That *Lye* was solely the agent of the office; and gave their verdict for the Plaintiff.

Merewether Serjt. obtained a rule *nisi* to set aside this verdict and enter a nonsuit instead, upon the grounds urged at the trial.

He relied on *Lindenau v. Desborough (a)*, where, in an insurance effected on the life of the Duke of Saxe Gotha, it was holden that the plaintiff could not recover, because he had omitted to disclose to the insurers the circumstance that the duke was imbecile, so as to be scarcely able to speak, although it was not supposed that his life could be affected by that circumstance; on *Maynard v. Rhodes (b)*, where the party effecting an in-

(a) 8 B. & C. 586.

(b) 5 D. & R. 266.

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surance on the life of another, was holden responsible for the representations made by the life insured; and on *Morrison v. Muspratt* (a), where the Court granted a new trial, because the office had not been referred to the person who had been medical attendant of the life insured during the last illness she had previously to the insurance.

Wilde Serjt. shewed cause. The conditions indorsed on the policy are of two kinds: those in the first column are preliminaries to the contract, to be attended to by persons proposing to insure, previously to their entering into the contract; those in the second column are parcel of the contract when completed.

It is competent to the insurers to dispense with any of the preliminary enquiries, or to take the burthen of them upon themselves, or to insist that the information required shall be furnished by the assured. But if, for whatever reason, they dispense with the assured's furnishing them with that information which is usually required at his hands; if they take the responsibility of enquiry upon themselves, and then sign a policy in which they declare that all the preliminaries required by them have been observed, they cannot afterwards avoid the policy on the ground that the assured has withheld information which they never required at his hands.


In this case there was such a dispensation on the part of the insurance office. They, by their agent, take the first step, and solicit the Plaintiff to insure with them. The Plaintiff knows nothing of the life insured, and can give no information on the matters preliminary to the contract; but in consideration that he will give their office the preference, they engage, through their agent *Lye*, to make all the necessary enquiries themselves.

They do not exact from the Plaintiff a declaration or

(a) 4 *Bingh.* 60.

warranty

warranty that *House* has correctly referred to his usual medical attendant; but merely that he is not affected with any disorder tending to shorten life: and drunkenness is a *habit*, not a *disease* or disorder.

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The declaration as to the usual medical attendant is signed only by *Lye*, who is found by the jury to have been solely the agent of the office.

If, therefore, in ordinary cases the assured is bound to state accurately who is the usual medical attendant of the life insured, the office have dispensed with such a statement from him here, and have admitted such dispensation by the policy they have executed, in which they recite that the Plaintiff has signed a declaration *in compliance with the conditions of the policy*. If they had required the Plaintiff to answer for the reference to the *medical man*, a declaration as to *House's health* only, — and the Plaintiff signed no other, — would not have been a compliance with their requisition.

It must be taken, therefore, that they accepted the declaration of their own agent, *Lye*, with respect to *House's* usual medical attendant, as the declaration made, as to that point, in compliance with the conditions of the policy. If so, they are bound by the acts of their own agent; they are responsible for his accuracy, and cannot cast upon the Plaintiff the consequences of his inaccuracy.

Lye having undertaken on the part of the office to procure the proper reference, it is no longer any part of the Plaintiff's warranty. *Lye's* seeking the information at the hands of *House* was merely accidental; he was at liberty to enquire where he pleased; but the Plaintiff could not be responsible for the falsehoods or inaccuracies of strangers whom *Lye* might consult; and to the Plaintiff *House* was an entire stranger. To bind the Plaintiff, a representation must have been made either by himself or his agent. But the Plaintiff himself was

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absolved by the office from making any representation on the subject of the usual medical attendant; it is impossible to say that *House*, whom he had never seen, was his agent; and *Lye* was the agent of the office.

And this distinguishes the present case from those which have been relied on on the part of the Defendants.

In *Lindenau v. Desborough* the decision turned on the Plaintiff's omitting to disclose a material fact which must have been within his knowledge or that of his agents; the state of the mental faculties of the life insured; there was no undertaking on the part of the office to obtain at their own risk the information he ought to have supplied; no waiver of any condition usually imposed on the assured. The same remark is applicable to *Morrison v. Muspratt*, where a husband who had effected an insurance on the life of his wife fraudulently omitted to disclose the circumstance of her having been long afflicted with pulmonary disease, and the name of the medical man who had attended her.

In *Maynard v. Rhodes* the declaration in the cause alleged that Colonel *Lyon*, the life insured, had himself subscribed and delivered into the *Pelican* office, a declaration setting forth his ordinary and then state of health; and that such declaration did set it forth truly, and was part of the consideration for the defendant's entering into the contract. (a) It appeared that Colonel *Lyon* was known to the plaintiff; that he was sent to the office to be examined personally on the 23d of *May* 1823; and that upon that occasion he signed a declaration that a gentleman of *Chichester* was his medical attendant; that he had never been seriously ill, and was then in good health; whereas from the month of *February* preceding that declaration to the month of *June* after, he had been attended in *London* by Dr. *Veitch*

(a) This circumstance is not adverted to in the printed report.

and

and Mr. *Jordan* on account of a determination of blood to the head, for which he was bled and blistered, and underwent other medical regimen.

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There, the plaintiff took upon himself to aver that the declarations of the life assured touching his health were true; an averment which he could not establish in point of fact.

The Plaintiff in the present case has set out the declaration he made himself. That declaration is confined to the age, profession, and exemption from mortal disorder of the life assured; and that declaration he has proved, as well as averred, to be true.

The preliminary reference to his medical attendant by the life assured forms no part of the declaration signed by the Plaintiff, and formed no part of his contract with the office, inasmuch as they had absolved him from giving them any information on the subject, and had through their agent *Lye* taken the risk of enquiry on themselves.

Merewether. The basis of the contract between the Plaintiff and the office, is, among other things, that the office shall be informed who is the usual medical attendant of the life insured; and whether that information was to be obtained by *Lye* for the office, or to be communicated by the Plaintiff, or by the life insured as constructively agent for both parties, the Plaintiff by signing the contract enters into a warranty that the reference to the medical attendant is a correct reference.

Admitting, however, that *Lye* was the agent of the office for all enquiries from which it was possible to exonerate the Plaintiff, and which the office could make independently of him or his agents, yet for the purpose of stating what is his health, or who is his medical attendant, the life insured is impliedly and necessarily the agent of the party who effects the insurance. His

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agency for the party insuring, in all matters which can only be learnt from him, is perfectly compatible with *Lye's* being agent for the office in all other matters usually cast upon the party insuring. The life insured is the only person who can give the required reference correctly. He is not the agent of the office, because they are not the persons called on, but calling, to act; not the persons required, but requiring the reference to be given; he must, therefore, be the agent of the party at whose hands that reference is required; the party who, as the basis of his contract, is called on to warrant that the reference, however obtained, by whomsoever furnished, is, at all events, true.

The Plaintiff, if he could not place sufficient reliance on the declarations of the life insured, might easily decline to enter into any such warranty, or to sign any such contract; but if he signs it the office ought not to suffer from the temerity of his warranty; for it is plain that they would never have entered into the contract, at least upon the same terms, if they had spoken with the usual medical attendant.

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BEST C. J. No longer ago than when the case of *Morrison v. Muspratt* was decided, this Court held, that if there was a reference to a man who *had been* the medical attendant, and no reference to the person who *was* the medical attendant of the life insured at the time the policy was effected, such an omission to refer to the proper person would vacate the policy. This Court granted a new trial in that cause, in consequence of a supposed misdirection of Lord *Tenterden*. Lord *Tenterden* afterwards, in *Lindenau v. Desborough*, spoke in terms of approbation of the decision of this Court, and in effect said, that he considered the decision of this Court as the rule which ought to guide him in giving his direction to the jury in that particular case. How

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is that case of *Morrison v. Muspratt* to be distinguished from the present? In that case, undoubtedly, the reference, as my brother *Wilde* has stated, was made by the assured; in this case, the reference made is not by the assured, but by the person whose life was insured. Then, is the assured affected by any misrepresentation of the person whose life is insured? In the case of *Maynard v. Rhodes*, that very point was decided by the court of king's bench. Colonel *Lyon*, the life insured by the plaintiff, in conformity with the regulations of the insurance office, attended to give the usual information as to the state of his health, and in the result the policy was effected. Colonel *Lyon* concealed or misrepresented a material circumstance touching his health. The learned Judge told the jury, if they were satisfied that the representation made by Colonel *Lyon* was not substantially true at the time the policy was effected, the plaintiff would be bound by the consequences of such misrepresentation, although he himself was not privy to the falsehood. A motion was made for a new trial. The judgment is given by Mr. Justice *Bayley*, Mr. Justice *Holroyd*, and Mr. Justice *Littledale*. The first says, "I am of opinion that the direction of the Lord Chief Justice to the jury was correct in point of law." Mr. Justice *Holroyd* says, "If the jury were satisfied the representations made by Colonel *Lyon* himself were untrue, it can make no difference in the legal result whether the policy was effected for his benefit or not; it was a conditional policy, and the party for whose benefit it was effected must stand to the consequences." Mr. Justice *Littledale* expresses himself as agreeing with the other two judges.

This is a very recent decision at the Court of King's Bench expressly on this point; but if we look at the circumstances of the present case, I think we may decide this point on the general rule of law, that the principal is

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responsible for any representations made by his agent relating to the business in hand. For, has not the Plaintiff, the assured, made Mr. *House* his agent for the purpose of this insurance? When Mr. *Lye* applies to the Plaintiff, the Plaintiff says, I can give no account, you must go and enquire who was Mr. *House's* medical attendant. And who could give him the best account? to whom should he go? who could give him direct and satisfactory information on the subject but Mr. *House*. Then, the assured must have known of the statement signed by *Lye*, because *Lye* swears that he shewed him the paper, and that the other said, I dare say it is all correct. He either did know it or might have known it, which, as far as regards his responsibility, is the same thing as if he did know it. He knew that Mr. *House* had been asked the question — “to what medical practitioner do you refer the directors of the office as most competent to give evidence respecting your present and general state of health and constitution, and your habits of life,” — and that he had answered, “I refer to Mr. *Vicary* of *Warminster*.” By suffering that paper to be handed in, he adopts that reference, and makes Mr. *House* his agent for the purpose of making the reference.

Is that a true and proper reference? Mr. *Vicary* of *Warminster* had never been *House's* medical attendant. But a medical man at *Bath* had attended him for some years, and could tell not only whether there were any incipient disease, but whether there were any habits which have a tendency to produce disease.

Without discussing the question whether habits of inveterate drunkenness have a tendency to produce disease or not, we may stop short here, and say, you have not referred to the medical attendant as you were required to do. The first count in the declaration states the policy of insurance: it then states the conditions, according

according to a clause by which it is "provided that this policy and insurance hereby effected shall at all times and under all circumstances be subject to such conditions and stipulations as are contained in the printed conditions of life-assurance indorsed hereon, in the same manner as if the same were actually repeated in the body of the policy, and adapted to this present case." One of those conditions is, that the names and residences of two gentlemen are to be referred to respecting the present and general state of the life of the insured — *one to be the usual medical attendant of the party*. The declaration in the cause then goes on to state, that all the conditions of the policy had been complied with, and, consequently, that there had been a reference to the proper medical man. Without proof of that, the Plaintiff could not recover in this action; and it is not an unnecessary allegation, because the declaration, in my opinion, would have been bad without it, for it would not truly have represented the contract between the parties. That contract is not confined to what is contained in the body of the policy, but embraces the conditions indorsed on it, and embraces the representations required by those conditions. It was absolutely necessary to set out in the declaration that these conditions had been complied with. So far from that being proved, undoubtedly it was disproved. I am of opinion, on this short ground, that a nonsuit ought to be entered.

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PARK J. In all actions on life-assurance, I am quite clear every regard ought to be paid to the assured, because, in general, it is a provision for a family, or it is a provision for a *bonâ fide* debt, as I have no doubt it was in this case; for there is not the least imputation on the Plaintiff in the cause; but, while one wishes to give every latitude and every indulgence to plaintiffs under

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under such circumstances, it is absolutely necessary that in every case of this description, there should be the purest good faith between the parties, and the most accurate representation of all material circumstances. Looking at this case in that point of view, I think there is nothing at all in the point that has been made. The case is merely this, that Mr. *House*'s life being the subject of insurance, the Plaintiff, who was to be benefited by that insurance, refers the agent of the office to make such enquiries as he can; the agent necessarily goes to the party who was to be the life insured. Was it not, then, of course, that the Plaintiff, who made the reference to this very man, because he was the person who could give the best information, should be bound by the representations *House* made concerning himself? And what does he say of himself? He is asked, to refer to his usual medical attendant. He says, my usual medical attendant is Mr. *Vicary* of *Warminster*. But was there a word of truth in Mr. *Vicary* being his usual attendant? Mr. *Vicary* was examined, and it appeared he had never been his medical attendant. No matter, then, whether Dr. *Harvey* were a good medical attendant or not—he was the person actually attending him, and his name was never mentioned. Then, is the Plaintiff, who effects the insurance, to be bound by this? It seems to me that *Maynard v. Rhodes* is exactly in point. There is no distinction whatever between that case and the present, because there, the assured was as ignorant of any thing like fraud, and as free from suspicion, as the Plaintiff here; yet, it was held, he was bound by the representations of the life insured.

But it is said, this misstatement is not material, or not so material as the misstatement in the case of *Maynard* and *Rhodes*. I do not agree in that. It is most material that the surgeon who has been in attendance
on

on the life insured, if such a one there be, should be referred to. If he never had had a surgeon attending him, he might have said so; but if he had one, it was material he should be referred to, and the Plaintiff knew it was material, otherwise he would not have declared in the manner he has done in this case, for he avers in his declaration the exact performance of this condition. Instead of alleging that the Defendant had dispensed with that information, as, perhaps, he might have alleged, (if he could have proved it,) according to the principle recognized in *Jones v. Barkley (a)*, he says, I have performed all the conditions hereinbefore recited. But he had not done so, for he had not referred to the usual medical attendant of the life insured.

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BURROUGH J. Here there is beyond all question a misrepresentation of a very material fact; of the name of the person who attended the life insured. There was another person who had been used to attend him. Beyond all doubt that is a misrepresentation. At the bottom of the policy there is this phrase: "A declaration as to all the above points will be considered as the basis of the contract between the assured and the company. If such declaration be not in all respects true, the policy will become void." One declaration is of "the name and place of residence of two gentlemen to be referred to respecting the present and general state of health of the life to be insured — one to be usual medical attendant of the party." Has the Plaintiff complied with that? so far from it, there has been a misrepresentation of the fact by the life insured. *Vicary* was not his medical attendant. There was another person who had attended, and who would have disclosed habitual intoxication. This is not complying.

(a) *Dougl.* 684.

with

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with the terms of the policy, and I think there ought to be a nonsuit.

GASELEE J. According to the terms of this policy, it is requisite that the names and residences of two gentlemen should be referred to respecting the state of the life assured—one the usual medical attendant of the party. Now, who is the person who can best disclose the name of such attendant? and does it not *ex vi termini*, almost import that the life assured himself shall be applied to to know who is his medical attendant? Mr. *House*, the life insured, was the person applied to here, and he has given a misrepresentation of that fact.

But it has been said, he was not the agent of the Plaintiff. The Plaintiff said to *Lye*, Do you make the necessary enquiries, and I will sign the paper. Now, it appears to me, when that is coupled with what passed afterwards, *viz. Lye's* coming and beginning to read over the declaration, and to state what was in it, when the Plaintiff cut him short, and said, he took it for granted it was right, that it does constitute *House* the agent of the Plaintiff, and that he is bound by the misrepresentation of such agent.

That, therefore, appears to me to be a sufficient ground on which a nonsuit ought to be entered in this case. I agree with my brother *Wilde*, that it was competent to the parties to have dispensed with this, or with any other of the conditions they thought fit. But suppose they had, should it not then, on the principle laid down in the case of *Jones v. Barkley*, referring to *Kingston v. Pearson*, have been said, "My declaration consisted of such and such particulars, which were required by the conditions, and I was ready to have declared and to have made it conformable to the policy, but the office did not insist on it, they dispensed with it, and they discharged me altogether from making it;"

that

that is the allegation in *Jones v. Barkley*, where the party said he had made and executed some, and was ready and offered to do the rest, but the other party dispensed with the whole. Then the question would have been, have they or not discharged them; I do not think my brother *Wilde's* point arises upon the record, or that it would have been competent to give in evidence, that they had dispensed with this condition, requiring the name of the usual medical attendant. On this ground, I am of opinion there should be a nonsuit.

Rule absolute.

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ELLIS v. SCHMÖCK and THOMAS.

June 1.


ACTION for goods sold and delivered. At the trial before *Best C. J.*, *London* sittings after *Trinity* term 1827, it appeared that the goods were furnished for the *Cornwall and Devonshire* mining company. The Defendants had received from the secretary of the company, certificates of their having paid a deposit upon the amount of their purchase money for certain shares in the company, and had received papers called the scrip of the company, but they had not signed the partnership deed, and had transferred their scrip before the action was commenced.

Both Defendants were present at a meeting of the company in *August* 1825, but the defendant *Thomas* had not purchased his scrip until after a portion of the goods, for the price of which this action was brought, had been delivered. It was urged, that as the Defendants had parted with their scrip, and had never signed the partnership deed, this action did not lie against them. However, a verdict was given for the Plaintiff, and the jury found specially, that the company originated in fraud,

The Defendants had purchased the scrip of a mining company originated in fraud, and had attended one meeting of the company; but they never signed the partnership deed, were innocent of the fraud, and transferred their scrip before the Plaintiff commenced an action for goods furnished to the company after Defendants had purchased their scrip:

but

Held, they were liable.

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but that neither the Plaintiff nor the Defendants were parties to the fraud.

Wilde Serjt. moved to set aside this verdict, and enter a nonsuit instead, on the grounds urged at the trial, or to reduce the damages to the amount of the goods furnished subsequently to *Thomas's* purchasing scrip. A rule nisi was granted, and

Taddy and *Spankie* Serjts. shewed cause.

The purchase of the company's scrip, and the attendance at the meeting constituted the Defendants partners in the concern, at least, as to third persons, although they never signed the partnership deed. A deed is not essential to a partnership, and the jury have found there was no fraud as between the Plaintiff and Defendants. *Perring v. Hone* (a) is an authority in point for the Plaintiff. In that case, Sir *J. Perring* was holden to be a partner in a similar company, and as such, incompetent to sue the company, although he had never signed the partnership deed, and had transferred his scrip almost as soon as he purchased it.

In *Vice v. Lady Anson*, (b) Lord *Anson* had attended no meeting, and done no act to participate in the concern. If a man purchase a share of a ship under a bad title, he is, nevertheless, liable as owner, for necessaries supplied to the ship.

Wilde and *Merewether* Serjts. *contra*.

In this case, the mining company, having originated in a fraud, to which the defendants were no parties, they did not become partners in the concern. Whether a man be partner or not, must depend on the contract between him and his fellows; and where he is taken in by a fraud,

(a) 4 *Bingb.* 28.

(b) 7 *B. & C.* 409.

the contract is void, and may be said not to exist for the purpose of binding the parties. In *Nockels v. Crosby*, (a) where a scheme for establishing a tontine was put forth, stating that the money had been paid to the directors, in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was held, that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without the deduction of any part towards the payment of the expences incurred. And as to the supposed case of a ship-owner's liability, *Harrington v. Fry*, (b) has expressly decided, that a party who purchases a share under an invalid conveyance, is not liable as a part-owner. In *Sir J. Perring v. Hone*, the company whose scrip the Plaintiff had purchased was a *bonâ fide* concern.

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Cur. adv. vult.

As several cases of a similar kind were depending in the court of King's Bench, the decision of the court here was postponed; and now, none of those cases having proceeded to judgment,

PARK J. said, — We have looked into this case, which was argued before my brothers *Burrough*, *Gaselee*, and myself, and are satisfied that the Plaintiff must have his judgment. We had thought that a case which is depending in the Court of the King's Bench might have thrown light on the subject, but we are of opinion now that there is no case which immediately touches this. I shall not go into it at any length. We think the jury have by their verdict gone very far to conclude the question; because they find that the Defendants form

(a) 3 B. & C. 814.

(b) 2 Bingh. 179.

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part of a company which was founded indeed in fraud, but they acquit both the Defendants and the Plaintiff of any cognizance of that fraud. The action was for goods sold and delivered to a very considerable amount, for furnishing the building in which the business of this company was to be carried on. We think that, under all the circumstances of this case, it approaches very nearly, if not quite, to the case of *Sir J. Perring and Others v. Hone*. In that case Sir John Perring had entered his name in a book with several others, for a projected joint stock company, he received scrip receipts, but he sold them before the deed was executed for the formation of the company; and he never did execute that deed; but notwithstanding that, inasmuch as he had attended meetings, and had received monies, and so forth, the Court was of opinion, upon consideration, that he was still liable. The case of Viscount and Lady Anson, we think, does not touch that, because in the case of that lady she had certainly received the scrip receipts, and she had perhaps in loose conversations in her own family talked of being a subscriber to the company, though it did not appear that she held herself out to the world in any respect as a partner; and, therefore, that case does not seem to us to apply to the present. In the present case the Defendants attended all the meetings, and though they did not in fact sign the deed, that was no more than was urged in the case of *Sir John Perring*. Under all the circumstances of the case, we think the Plaintiff is entitled to keep the verdict.

Judgment for the Plaintiff for 234*l.*, the value of the goods furnished after the Defendants were concerned with the company.

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(IN THE EXCHEQUER CHAMBER.)

May 13.

LLOYD and Others v. SIGOURNEY.

ERROR from the court of King's Bench, in an action of *assumpsit* for money had and received, in which judgment had been given for *Sigourney* the Plaintiff below, on the following special verdict: —

In the month of *July*, Captain *Attwood*, who commanded a vessel belonging to the Plaintiff below, took in payment of a cargo of flour, the property of the Plaintiff, which he sold at *Rio Janiero*, a bill of exchange for \$164*l.* 11*s.* 8*d.*, drawn in a set of three, by *March, Sealy, Walker, and Co.*, of that place, on *March, Sealy, and Co. of London*. This bill was payable to the order of Messrs. *Hendricks, Wierss, and Co.*, who indorsed it to Captain *Attwood*. The following is a copy of the third part of the bill: —

“*Rio de Janiero, 12th July 1825.*

“For £3164 11*s.* 8*d.*

“At sixty days sight, pay this third of exchange, first and second not paid, to the order of Messrs. *Hendricks, Wierss, and Co.*, three thousand one hundred and sixty-four pounds, eleven shillings, and eight pence, value of the same, which place to account, as per advice from

“*MARCH, SEALY, WALKER, and Co.*”

This was indorsed by the payees to *A. Attwood*: by *Attwood* to the Plaintiff below: by the latter in the following words: —

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O o

“Pay

A bill of exchange, drawn in *America* on a house in *London*, payable to order, was indorsed by the payee generally to *A.*, and by him in these words, “Pay to *B.* or his order for my use.” *B.* applied to his bankers to discount the bill, and they, without making any enquiry, did so, and applied the proceeds to the use of *B.*: Held, that the indorsement was restrictive; that the property in the bill remained in *A.*; and that he was entitled to recover the amount from the bankers.

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“ Pay to *Samuel Williams*, Esq. of *London*, or his order, for my use ; ”

And by *S. Williams* to the Defendants below.

Attwood sent the first of the set to the correspondent of the Plaintiff below, Mr. *Samuel Williams* of *London*, who was an *American* agent, and factor for merchants and planters, carrying on such business to a great extent, enclosed in the following letter : — “ Sir, — I herewith have the honour to enclose you the first of exchange for 3164*l.* 11*s.* 8*d.* sterling, at sixty days sight, on Messrs. *March, Sealy*, and Co., in *London*, in favour of myself, it being the proceeds of a cargo of flour, in brig *Swiftsure*, belonging to *Henry Sigourney*, Esq., *Boston, America*, which you will please to present for acceptance, and keep at the disposal of the second or third.” But he did not indorse the bill. *Williams* received the letter and bill on the 26th *September* 1825, and procured the acceptance of the bill in due course. The third of the set was remitted to the Plaintiff below ; and he, having indorsed it as aforesaid, “ Pay to Mr. *Samuel Williams*, or order, for my use,” remitted it to *Williams* in the following letter of the 17th *September* 1825 : — “ Captain *Amaziah Attwood*, of my brig *Swiftsure*, arrived here yesterday from *Rio Janiero*. He informs me, that he left a letter directed to you, to be forwarded to you by the next *English* mail, containing the first of *March, Sealy, Walker*, and Co.’s draft on *March, Sealy*, and Co., *London*, dated 12th *July*, at sixty days sight, for 3164*l.* 11*s.* 8*d.* sterling, in favour of Messrs. *Hendricks, Wierss*, and Co., and by them indorsed to said *A. Attwood*. He thinks he did not indorse the draft ; and if received, it can only be accepted. Enclosed you have third bill of the set, indorsed to me by Captain *Attwood*, and to yourself by me. I presume that if the other should have been previously received and accepted, a receipt

on

on the one now transmitted would be accepted at maturity. Have the goodness, when you advise the receipt, which I trust will be as soon as possible, of the present, to inform me the standing of the acceptors. *Henry Sigourney.*" The letter and bill were received by *Williams* on the 26th *October* 1825. The Defendants below had no notice of the before-mentioned letters of Captain *Attwood* and of the Plaintiff below. *Williams* stopped payment on the 24th *October* 1825, and a docket was struck against him on the 25th of the same month, upon which a commission, dated the 27th of the same month, was issued, and he was declared a bankrupt immediately afterwards. At the time *Williams* received the bill in question, as well as at the time of his bankruptcy, the balance of account was in favour of the Plaintiff below to the amount of upwards of 3000*l.*, exclusive of the before-stated bill. On the morning of the 22d *October*, when the discount hereinafter mentioned was made, the balance in favour of *Williams* with the Defendants below was 3784*l.* 10*s.* 10*d.* About eleven o'clock on that day *Williams* indorsed the bill in question, with others, amounting in the whole to 7081*l.* 17*s.* 9*d.*, to the Defendants below, who were his bankers, and in the habit of discounting for him very largely, and the said bills were *bonâ fide* discounted for him, and credit given to him for the amount, less the discount; and subsequently, *viz.*, at the clearing house about five o'clock in the evening of that day, the Defendants below paid *Williams's* acceptances due that day to the number of thirty-two, and three drafts, amounting to 10,683*l.* 18*s.* 6*d.* The bill in question was honoured at maturity, and the amount received by the Defendants below on the 28th *November* 1825.

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Patteson for the Defendants below. The general rule is, that an indorsement transfers to the indorsee all the

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rights of the indorser, and, among others, the right of transferring the interest in the bill by indorsement. *More v. Manning* (a), *Acheson v. Fountain* (b), *Edie v. East India Company*. (c). In the latter case, *Wilmot J.* even intimated a doubt whether there could be a restrictive indorsement. But, conceding that there may, the question is, Whether the indorsement in this case contains clear negative words restraining the negotiability of the bill? The words must be construed most strongly against the Plaintiff below, the party using them. First, the bill is indorsed payable to order. *Primâ facie*, therefore, it was transferable. The legal title was in *Williams*, though, as between the Plaintiff below and him, he might be bound to hold the bill for the use of the Plaintiff below; and if *Williams* had the legal title, he might transfer his interest in the bill by indorsement. In *Snee v. Prescott* (d) the language of the bill was, "Pay to my use and order;" not, "pay *A. B.* to my use." The meaning of such an indorsement was considered in *Evans v. Cramlington* (e): there the bill was payable "to *Price* or order, for the use of *Calvert*." *Price* indorsed it to *Evans*; after which an extent issued against *Calvert*, and the money due upon the bill was seized to the use of the king. These facts appearing upon the pleadings, two points were made upon demurrer: the one, whether *Calvert* had such an interest in the money as might be extended; and the other, whether *Price* had power to indorse the bill, or whether he had only a bare authority to receive the money for the use of *Calvert*: and the Court of King's Bench, and afterwards the Exchequer Chamber, held, that *Calvert* had not such an interest as could

(a) *Com.* 311.


(b) 1 *Str.* 557.

(c) 2 *Burr.* 1216.

(d) 1 *Atk.* 247.


(e) *Cartb.* 5. 2 *Vent.* 307. *Skin.* 264. 1 *Show.* 4.

be extended, and that *Price* had power to indorse the bill; and judgment was given for the Plaintiff. In the case, as reported in *Showers*, p. 4., Lord *Holt* says, "This is a bill which is assignable by *Price*, and when *Price* assigned it he received the money, and that receipt was for the use of *Calvert*; and there *Calvert* hath his action; but we can take notice of none but *Price*; and at this rate the credit of bills of exchange will be spoiled." If *Calvert's* consent had been necessary, that must have been stated in the pleadings to have been given; but there is no such averment. The pleadings are set out in *Ventris(a)*. That case, therefore, is an authority to shew that *Williams* had authority to transfer the interest in the bill in this case. The words "to my use" may be construed as a direction from the Plaintiff to *Williams*, his agent, to apply the bill, or the proceeds of it, to his, the Plaintiff's, use. The other construction makes the indorsement restrictive. But the intention is not clear; and it ought to be so, in order to restrain the negotiability of the bill. If the first construction be adopted, the Defendants below clearly were not bound to see to the application of the money. If the words of the indorsement had been, "which place to my account," or "which hold to my use," the Defendants below would not have been bound to look to the application of the money. The party to whom a bill is tendered is not bound to make any enquiry. According to the argument on the other side every subsequent indorsee would be a trustee for the Plaintiff below. That would be very inconvenient. In *Evans v. Cramlington(b)* Lord *Holt* says, that when *Price* assigned the bill, and received the money, he became trustee for *Calvert*. If that be so, then *Williams*, by indorsing for value to *Lloyd*, became trustee for

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(a) Page 308.

(b) 1 *Show.* 4.

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the Plaintiff below. He could not make the Defendants below trustees for the Plaintiff below. The reasonable construction of the indorsement is, that it was a direction by the principal to his selected agent to apply the proceeds to his use. If there were any fraud or other suspicious circumstances, the case might have been different. *Treuttel v. Barandon* (a) proceeded on that ground. And in *Robarts v. Kensington* (b) the sum mentioned in the bill was only to be paid in a certain event specified in the indorsement, of which the acceptors had notice, as they did not accept till after the indorsement. The Defendants below applied the money generally, according to the direction of *Williams*: they could not know in what mode *Williams* was to apply the money to the use of the Plaintiff below. This was a *boná fide* discount, in the way of trade, to *Williams* himself. The Defendants below were not trustees for the Plaintiff below.

F. Pollock for the Plaintiff below. The bill belonged to the Plaintiff below, and he is entitled to recover its amount from the Defendants. The indorsement was special, so as to prevent the indorsee from transferring any interest in the bill beyond the particular purpose or the particular individual mentioned in the indorsement. The earliest case where such a special indorsement is mentioned is *Snee v. Prescott*. There Lord *Hardwicke* says, "Promissory notes and bills of exchange are frequently indorsed in this manner: — *Pray, pay the money to my use*, in order to prevent their being filled up with such an indorsement as passes the interest." In *Edie v. The East India Company* (c), *Wilmot J.*, speaking of an indorser, says, "To be sure, he may give a mere naked authority to a person to receive

(a) 8 *Taunt.* 100. (b) 4 *Taunt.* 30. (c) 2 *Burr.* 1227.

it for him: he may write upon it, 'Pray, pay the money to my servant, for my use;' or use such expressions as necessarily import that he does not mean to indorse it *over*, but is only authorizing a particular person to receive it for him, and for his *own use*. In such case it would be clear that no valuable consideration had been paid him; but, at least, that intention must appear upon the face of the indorsement." It appears, therefore, from these two authorities, that an indorsement in the form used in the present case, will prevent the indorsee from passing the interest in the bill by a subsequent indorsement. The general indorsement of a bill makes it the legal property of the indorsee, and gives him the *jus disponendi*; but an indorsement for the use of another is notice that the property in the bill is in that other, and that the holder is an agent for him, and cannot transfer the bill. *Evans v. Cramlington* only decided that the drawer of a bill, in favour of *A.* to the use of *B.*, could not, when sued by *C.*, to whom it had been indorsed by *A.*, set up as a defence the rights of *B.* as a *jus tertii*.

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BEST C. J. We are all of opinion, that the judgment of the Court of King's Bench must be affirmed. Whoever reads the indorsement on this bill of exchange must perceive that its operation is limited, and that the object of the indorser was to prevent the money received in respect of the bill from being applied to the use of any other person than himself: to whomsoever the money might be paid, it would be paid in trust for the indorser; and into whose hands soever the bill travelled, it carried that trust on the face of it. And we see no inconvenience to commercial interests from such a limitation of the effect of the indorsement so expressed; the only result will be, to make parties open their eyes and read before they discount.

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It is impossible to read this indorsement without seeing that *some* enquiry is necessary; for if such be not the use of the words introduced, they are of no use. But if a use can be found for them, the Courts must apply them in the way in which they were intended to operate.

The indorser has added the words *or order*, to the name of the indorsee, because, if he had not done so, the indorsee must have attended in person to obtain payment of the bill, and the short way to obviate that inconvenience was to introduce the words *or order*. But he still intended that the person ordered by the indorsee to receive the amount should receive it to the use of him, the indorser.

But the Defendants below, instead of paying the amount of the bill for the use of *Sigourney*, the indorser, have discounted it for the use of *Williams*, the indorsee. We are all, therefore, of opinion that the judgment of the Court of King's Bench must be

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THE tenth count of the declaration stated, that the Plaintiff on, &c., at, &c., at the special instance and request of the Defendants, bargained with the Defendants to buy of them, and the Defendants then and there agreed to sell to the Plaintiff divers, to wit 1000, sheets of copper, for the purpose of sheathing the bottom of a certain barque or vessel called the *Isabella*; and the Defendants by then and there falsely and fraudulently warranting the said last-mentioned sheets of copper, which had been made and manufactured by the Defendants, to be reasonably fit and proper for the purpose last aforesaid, then and there sold the last-mentioned sheets of copper to the Plaintiff at and for a large sum of money, to wit, the sum of 313*l.* 3*s.*, which was afterwards paid by the Plaintiff to the Defendants for the same: whereas, in truth and in fact, the last-mentioned sheets of copper were not, at the said time of the said warranty and sale thereof as aforesaid, reasonably fit or proper for the purpose last aforesaid; but, on the contrary thereof, the said last-mentioned sheets of copper were at that time of an inferior quality, and wholly unfit and improper for the purpose last aforesaid; whereby the said last-mentioned sheets of copper, afterwards, to wit, on, &c., at, &c., became and were greatly corroded, injured, and destroyed, and of little or no use or value to the plaintiff; and so the Defendants, by means of the said last-mentioned premises, on, &c., at, &c., falsely and fraudulently deceived the Plaintiff on the sale of the said last-mentioned sheets of copper as aforesaid. Then followed an allegation of special damage.

The Plaintiff purchased from the warehouse of the Defendant, the manufacturer, copper for sheathing a ship. The Defendant, who knew the object for which the copper was wanted, said, "I will supply you well."

The copper, in consequence of some intrinsic defect, the cause of which was not proved, having lasted only four months, instead of four years, the average duration of such an article,

Held, in an action on the case in the nature of deceit, that the Plaintiff was entitled to damages.

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The eleventh count differed from the preceding only in omitting the name of the vessel, and the allegation that the copper had been made and manufactured by the Defendants.

At the trial before *Best C. J.*, *London* sittings after *Michaelmas* term, the case proved was as follows:—

The Plaintiff was a shipowner; the Defendants manufacturers and venders of copper for various purposes.

Fisher, a mutual acquaintance of the parties, introduced them to each other, saying to the Defendants, “Mr. *Jones* is in want of copper for sheathing a vessel, and I have pleasure in recommending him to you, knowing you will sell him a good article;” one of the Defendants answered, “Your friend may depend on it, we will supply him well.”

Copper was lying in the Defendants’ warehouse, in sheets of various size, thickness, and weight: the Plaintiff’s shipwright selected what he thought fit, and afterwards applied it to the Plaintiff’s ship, observing nothing amiss. The invoice described the article sold as “Copper for the ship *Isabella*.” The Plaintiff paid the market-price as for copper of the best quality; and his ship proceeded on a voyage to *Sierra Leone*. The copper, however, instead of lasting four or five years, the usual duration of copper employed in sheathing vessels, was, at the end of four or five months, greatly corroded in patches of holes, and unfit for further service.

Scientific men, called on the part of the Plaintiff, ascribed the failure to an oversight or casualty in the manufacture, whereby the copper might have imbibed more oxygen than it ought to contain; but all imputation of fraud on the Defendants was disclaimed by the Plaintiff. The Defendant’s witnesses accounted for the corrosion from the singular inveteracy of the barnacles in the river at *Sierra Leone*, where the ship lay for some time.

time. They stated that the quality of copper might always be known by its appearance and malleability; and that if there had been any defect in that sold to the Plaintiff, his shipwright must have discovered it while in the act of sheathing the vessel.

The Chief Justice left it to the jury to determine whether the decay in the copper was occasioned by intrinsic defect or external accident; and if it arose from intrinsic defect, whether such defect were occasioned in the process of manufacture.

The jury found that the decay was occasioned by some intrinsic defect in the quality of the copper; but that there was no satisfactory evidence to shew what was the cause of that defect. A verdict was thereupon entered for the Plaintiff, subject to an enquiry by an arbitrator as to the amount of damages.

Ludlow Serjt. obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground, that without an express warranty, or proof of fraud, the Defendants were not responsible for the quality of the article they sold.

Wilde and *Russell* Serjts. shewed cause. When an article is sold for a particular purpose, a warranty is implied that it is fit for that purpose.

The Defendant's copper was sold for the purpose of sheathing a ship; if not adapted to that purpose, it was of no use to the Plaintiff: he would only have purchased it, therefore, on the supposition that the Defendants undertook it should have the requisite qualities. The rule, *caveat emptor*, applies only where articles are bought in the way of merchandize, and not for any specific use. But good policy requires that the seller should be responsible where he sells an article for a specific use. In many instances, it is impossible that
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the buyer should, by any degree of care or diligence, be able to ascertain beforehand, whether the article in question will answer the purpose for which it is destined; but the seller has generally the means of knowing this, and of preparing his article accordingly, more especially where, as in the present case, he is the manufacturer. So that, if the position be true with regard to those who merely sell for a particular purpose, it is true *à fortiori* of those who manufacture and sell. If the Defendants had sued for the price of the copper, it would have been an answer to such an action for the Plaintiff to have shewn that the copper had entirely failed when applied to the purpose for which it was sold. If so, it is but justice that the Plaintiff, having paid the price, should recover damages if the consideration fails. The result of all the decisions on the subject is, that the rule of *caveat emptor* does not apply where an article is sold for a particular purpose. Dealings for horses and other animals may easily be distinguished, because, as the animal is not produced by human agency, the seller has no more means than the buyer of guarding against or knowing intrinsic and hidden defects. But the same principle seems to apply in those cases also: for if a horse be sold generally, without any intimation of the particular work to which he is to be applied, the buyer takes him at all risks, and the seller is not responsible unless there be fraud or an express warranty; but if the buyer specifies the purpose for which he wants the horse,—as to drive in a gig, or to carry a child, and it should turn out that the horse had never been in harness, and was unable to draw, or vicious and intractable, the buyer might recover on proof of the animal's inaptitude for the purpose for which he was sold. According to *Blackstone* (a), a presumptive undertaking or

(a) 3 *Bl. Com.* 161.

assumpsit arises in such cases “from the general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires.” Therefore, in *Laing v. Fidgeon* (a), it was held, that in every contract to furnish manufactured goods, however low the price, it is an implied term that the goods should be merchantable. And though in *Fisher v. Samuda* (b) it was held, a party could not maintain an action on the ground of the goods being of a bad quality, and unfit for the purpose for which they were ordered; that was, after an action had been brought for the value of the goods furnished at a stipulated price, and the purchaser did not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allowed the seller to recover a verdict for the full price agreed upon.

But in *Gardiner v. Gray* (c), where the defendant sold twelve bags of *waste silk* at 10s. 6d. per pound, which on its arrival was found to be of a quality not saleable under the denomination of *waste silk*, Lord *Ellenborough* said, “The purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty, there is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them.” In *Okell v. Smith* (d) and *Bluett v. Osborne* (e), Lord *Ellenborough* lays down the same principle, though it should seem that the latter case must be misreported, inasmuch as

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(a) 6 Taunt. 108.

(b) 1 Campb. 190.

(c) 4 Campb. 144.

(d) 1 Stark. 108.

(e) 1 Stark. 384.

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the decision is apparently at variance with the principle laid down, "A person who sells impliedly warrants that the thing sold shall answer the purpose for which it is sold." In *Pasley v. Freeman* (a), *Buller J.* said, "It was rightly held by *Holt C. J.*, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended." In *Yeats v. Pim* (b), *Gibbs C. J.* says, "Where a party undertakes that he will supply goods of a certain description, he must execute his engagement accordingly." It may be presumed from the premature decay, that the whole of the article furnished to the Plaintiff was not copper; that there was a mixture of some other ingredient; if so, *Bridge v. Wain* (c) is an authority conclusively in favour of the Plaintiff. In *Prosser v. Hooper* (d), the undertaking of the parties, collected from their acts, was held sufficient to controul the words of the contract, from which a warranty would otherwise have been implied; and *Chandelor v. Lopus* (e) does not apply, having merely decided, that in an action on the case for selling, as a bezoar-stone, a stone which was not a bezoar, it is necessary to allege in the declaration that the defendant knew it not to be a bezoar; but the allegation of knowledge, if necessary in the present case, is implied in the statement that the Defendants were the manufacturers of the article supplied. The only cases which can be relied on by the Defendants are *Parkinson v. Lee* (f) and *Gray v. Cox* (g). But in *Parkinson v. Lee* the Defendants were not the growers of the hops they sold; the hops had been damaged without their knowledge; they were sold from samples fairly drawn, and were equal to the samples;

(a) 3 T. R. 57.

(b) 2 Marsh. 141.

(c) 1 Stark. 504.

(d) 1 B. M. 106.

(e) Cro. Jac. 4.

(f) 2 East, 314.

(g) 4 B. & C. 108.

and

and in *Gray v. Cox* the Court decided simply on the ground, that a warranty of a very extensive kind, alleged in the declaration, was not sustained by the evidence at the trial.

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Ludlow Serjt. contra. This is not an action of *assumpsit*, but an action on the case in the nature of deceit; and the whole current of earlier authorities, confirmed by recent decisions, prove that the Plaintiff in such an action must allege and shew either an express warranty, or that the Defendant knew that the article he sold was not such as he represented it to be. In all other cases the rule of *caveat emptor* applies. Lord *Coke* says, "By the civil law, every person is bound to warrant the thing that he sells or conveys, although there be no express warranty; but the common law binds him not, unless there be a warranty either in deed or in law; for *caveat emptor*." (a) In the present case, there is no pretence for saying that any express warranty was given; and knowledge on the part of the defendants of any defect in the copper, is neither averred nor proved. In the transaction with the Plaintiff, the Defendants were the mere sellers of the copper, which lay in their warehouse ready for delivery, and was inspected and chosen by the Plaintiff's agent: the circumstance that they were also the manufacturers is a mere accident, which does not affect the case, because the article was not made to order; the allegation, therefore, that they were the manufacturers, is not tantamount to an averment that they knew of the defects in the article they sold from their warehouse; and no authority can be found, in which in an action of deceit a warranty has been implied, without averment and proof of knowledge. In an action on an express warranty, the breach of the

(a) *Co. Lit.* 102 a.

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warranty is the gravamen, and in such case it is not necessary to allege the *scienter*, nor, if alleged, to prove it: but in actions on the case, in the nature of deceit, the gravamen is the deceit, and the gist of the action is the *scienter*. *Williamson v. Allison*. (a) In the old writs, *sachant* is always the material word. 1 *Fitz. N. B.* 9. And the text-books, *Statham's Abr.*, *Noy's Maxims*, *Wood's Instit.*, lay down the law as settled on that head. *Roll. Abr. Act. on Case*, p. 90. pl. 1, 2, 3, 4. If an allegation of a warranty in the declaration can be supported by the proof of a contract for the sale of goods for a specific purpose, there is an end of the distinction between implied and express warranties. The *scienter* need not be proved in any case, since the implied warranty would always be tantamount to an express warranty, and so preclude the necessity of proving the *scienter*. The only question, therefore, in this case is, Whether the law will, according to the dictum of Lord *Tenterden* in *Gray v. Cor*, lay upon the seller or manufacturer an obligation to warrant in all cases that the article which he sells shall be reasonably fit and proper for the purpose for which it is intended, and render him responsible for all the consequences which may result, if it shall be found not to answer the purpose for which it was designed, and that, on account of some latent defect of which he was ignorant, and which shall not be proved to have arisen from any want of skill on his part, or the use of improper materials, or any accident against which human prudence might have been capable of guarding him?

If such a doctrine can be maintained, every dealer or manufacturer, — however skilful in the exercise of his art; however careful in the selection of his materials; and however cautious in the language of his contracts, — may be ruined in a moment by the unexpected failure of his

(a) 2 *East*, 446.

commodity. Suppose, for instance, the snapping of a chain-cable holding a valuable East Indiaman, and the consequent loss of the vessel. Is the seller of the cable to be held responsible for the consequences, although it be not shewn that it was attributable to his negligence, want of skill, or the use of improper materials? As well may the solicitor under whose instructions the declaration in the cause was prepared be held responsible if it be found unfit or improper for the purpose for which it was intended, although it shall not be proved to have been owing to his want of skill or diligence; or the purchaser of a quack medicine complain that he has been imposed on by an advertisement, which all the world recognises as a puff.

Lord *Tenterden* seems to have been himself aware of the extensive consequences of such a doctrine, when he introduces the word “reasonably,” which appears to have been intended to limit the responsibility to an obligation to provide an article which should be as fit and proper for the purpose for which it was intended as the application of skill, diligence, and prudence in the selection of the materials and in the manufacture could reasonably render it.

All the recent cases, when examined, are in favour of the Defendants. In *Yeats v. Pim*, there was an express warranty: the custom of the trade was set up as an answer, but was held insufficient. In *Bridge v. Wain*, the plaintiff recovered on a count stating that he contracted for scarlet cuttings, and that the article supplied was not scarlet cuttings. In *Fisher v. Samuda*, no question arose as to the extent of the warranty; and there, the goods were supplied for exportation, and were never seen by the plaintiff; which appears also to have been the case in *Laing v. Fidgeon*. *Gardiner v. Gray* is also an authority in favour of the Defendants; for there it was held, that there was no implied warranty that the

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goods should be equal to the sample exhibited ; but the plaintiff recovered, because the article supplied was not that which was described in the contract. The passage cited from *Bluett v. Osborne* is, indeed, *prima facie* in favour of the Plaintiff; but Lord *Ellenborough* immediately afterwards says, “ In this case the bowsprit was apparently good, and the Defendants had an opportunity of inspecting it. No fraud is complained of; but the bowsprit turned out to be defective upon cutting it up. I think the Plaintiff is not liable on account of the subsequent failure.” In the present case no fraud is imputed: the copper was apparently good, and the Plaintiffs had an opportunity of inspecting it. The Defendants, therefore, are not liable on account of the subsequent failure. In *Weall v. King (a)*, the declaration averred a contract for stock sheep; and the whole question, as far as warranty was concerned, was upon the custom, as explaining the meaning of the contract. Here the article supplied was sheathing copper; there was no evidence that the customary meaning of sheathing copper was “ copper that would last five years;” and the invoice, which alone is evidence of the contract, does not state it to be copper for sheathing. Then *Parkinson v. Lee* is expressly in point; the second count there, averred a promise to supply good, sound, and merchantable hops. The evidence was, that the Plaintiff paid a fair market price for merchantable hops; but no express warranty being proved, it was held that the Defendant was not responsible for a latent defect in the article. In *Gray v. Cox*, the Court did not sanction the opinion expressed by Lord *Tenterden*.

Cur. adv. vult.

BEST C. J. It is the duty of the Court, in administering the law, to lay down rules calculated to prevent

(a) 12 East, 452.

fraud;

fraud ; to protect persons who are necessarily ignorant of the qualities of a commodity they purchase ; and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied. The Court must decide with a view to such rules, although, upon the present occasion, no fraud has been practised by the parties calling for decision. This is an action against the Defendants, to recover damages for the insufficiency of certain copper which they furnished for a particular purpose. It has been asserted that the invoice is the only evidence of such a contract, and that the Defendants ought not to be bound by a loose conversation at the time of the sale. An invoice, however, is frequently not sent till long after the contract is completed, and is altogether unlike a broker's note which does contain the contract between the parties ; but if we look at the invoice alone, we see in the present case that the copper was expressly for the *ship Isabella*. However, I do not narrow my judgment to that, but think on the authority of a case not cited at the bar, *Kain v. Old (a)*, that " where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination." In that doctrine I entirely concur.

Whatever, then, was not previous discussion, but formed part of the contract, may be taken into consideration. In a contract of this kind, it is not necessary that the seller should say, " I warrant;" it is enough if he says that the article which he sells is fit for a particular purpose. Here, when *Fisher*, a mutual acquaintance of the parties, introduced them to each other, he said, " Mr. Jones is in want of copper for

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(a) 2 B. & C. 634.

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sheathing a vessel;" and one of the Defendants answered, "We will supply him well." As there was no subsequent communication, that constituted a contract, and amounted to a warranty.

But I wish to put the case on a broad principle:— If a man sells an article, he thereby warrants that it is merchantable, — that it is fit for some purpose. This was established in *Laing v. Fidgeon*. If he sells it for a particular purpose, he thereby warrants it fit for that purpose; and no case has decided otherwise, although there are, doubtless, some dicta to the contrary. Reference has been made to cases on warranties of horses: but there is a great difference between contracts for horses and a warranty of a manufactured article. No prudence can guard against latent defects in a horse; but by providing proper materials, a merchant may guard against defects in manufactured articles; as he who manufactures copper may, by due care, prevent the introduction of too much oxygen: and this distinction explains the case of *Bluett v. Osborn*, in which Lord *Ellenborough* held, that the defendant, who had sold a bowsprit, was not responsible for a failure arising out of a latent defect in the timber.

The decisions, however, touching the sale of horses turn on the same principle. If a man sells a horse generally, he warrants no more than that it is a horse; the buyer puts no question, and perhaps gets the animal the cheaper. But if he asks for a carriage horse, or a horse to carry a female, or a timid and infirm rider, he who knows the qualities of the animal, and sells, undertakes, on every principle of honesty, that it is fit for the purpose indicated. The selling, upon a demand for a horse with particular qualities, is an affirmation that he possesses those qualities. So, it has been decided, if beer be sold to be consumed at *Gibraltar*, the sale is an affirmation that it is fit to go so far. Whether or not an article has been
sold

sold for a particular purpose, is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. As to the puffs to which allusion has been made, the Court has no wish to encourage them: they are mere traps for buyers; and if a case were to arise out of a contract made under such circumstances, and it were shewn that the article puffed was of inferior quality, when asserted to be of the best materials and workmanship, the seller would be bound to take it back, or make compensation in damages.

These principles decide the present case in favour of the Plaintiff. After what Lord *Tenterden* had said in *Gray v. Cox*, I declined expressing an opinion at *Nisi Prius*; but I expected the jury would have found that the article was not properly manufactured, for the testimony of the scientific witnesses was very clear; and though the conduct of the Defendants was most upright, the article they sold had certainly suffered in the manufacture. At all events, the warranty given by them is not satisfied, because the jury find that there is an intrinsic defect in an article manufactured by them.

Old cases have been cited; and *Chandelour v. Lopus* at the head of them: but that does not bear on the question, because all that the Court decided is, that to render the Defendants liable, there must be a warranty or a false representation. But the case does not decide there must be an express warranty; an implied warranty would satisfy the terms of the decision. Here there has been, in my opinion, an express warranty. The most material case is *Parkinson v. Lee*: but the point was not decided there: the Court only decided, that a warranty, that hops sold should be equal to sample, was satisfied by shewing that they were equal to sample, although not perfectly good and merchantable. Then, the defect complained of was in a product of nature, not of human art, and was unknown to the

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sellers. That case too, was decided in 1802, and *Gibbs* C. J. cannot be supposed to have been unacquainted with it, when he decided *Laing v. Fidgeon*, in 1815; yet he there decided the point now in dispute, that in every contract to furnish manufactured goods, however low the price, it is an implied term, that the goods should be merchantable.

The law, then, resolves itself into this; —that if a man sells generally, he undertakes that the article sold is fit for *some* purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose.

In the present case the copper was sold for the purpose of sheathing a ship, and was not fit for that purpose: the verdict for the Plaintiff, therefore, must stand: the case is of great importance; because it will teach manufacturers that they must not aim at underselling each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold.

PARK J. I entertain no opinion adverse to the character of the Defendants, because the mischief may have happened by the oversight of those whom they employ; but on the case itself I have no doubt, distinguishing, as I do, between the manufacturer of an article and the mere seller. The count on which the jury have found for the Plaintiff states, that the Defendants, by falsely and fraudulently warranting that copper which had been manufactured by them was reasonably fit and proper for the purposes of sheathing the bottom of a vessel, sold the copper to the Plaintiff for a large sum of money, whereas the copper was wholly unfit for the purpose, and of little or no use to the Plaintiff. Now, independently of the evidence of *Fisher*, which goes to shew an express warranty, is there not, where the purchaser

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chaser cannot judge of the interior of the article, and buys for a particular purpose, an implied warranty, that the article is fit and proper for the purpose for which it is purchased? And it is surely improper that copper, which usually lasts four or five years, should corrode in a single voyage. It has been argued, that in all cases there must be a warranty, or a *scienter* and fraud. Perhaps so; but till the cause comes to proof, it cannot appear whether the warranty be implied or express; and it will be enough to show that there is an implied warranty, from the nature of the dealing between the parties. In the cases referred to, the point has been decided, to the full extent that the Plaintiff requires in this case. The principal object of attack has been the case of *Gray v. Cox*, where Lord *Tenterden* said, "that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." And this is not to be esteemed an *obiter dictum*, because the other judges differ from him. It is his judgment formally given, and goes to support the argument for the Plaintiff in this cause. The other judges, indeed, only doubted whether the warranty given in evidence supported the warranty laid in the declaration, which was very extensive; a doubt in which Lord *Tenterden* concurred. But if the declaration had been framed in the language of the present, it is probable the evidence in support of it would have been deemed sufficient. In *Fisher v. Samuda*, the plaintiff had paid for the goods after an action had been brought against him for the price, in which he did not, either in bar or reduction of damages, object to the quality of the goods; so that he may be said to have acquiesced in the defect, and the case has no bearing on the present. In *Laing v. Fidgeon* the rule is laid down in the strongest terms; and no man had more knowledge of commercial law than C. J. *Gibbs*. In *Gardiner*

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v. *Gray*, Lord *Ellenborough* lays down the same rule, and says, that the principle of *caveat emptor* does not apply where the buyer has no opportunity of inspection. It has been argued that the Plaintiff had inspection here; but it was merely of the exterior of the commodity, and he had no means of knowing its intrinsic qualities. In *Okell v. Smith*, it was laid down that the seller is bound to furnish a commodity that will answer the purpose for which it is sold; and Lord *Ellenborough* said, in *Bluett v. Osborne*, that by selling an article the vendor impliedly warrants it fit for the purpose for which it is sold, and that it is important for the interests of commerce that it should be so. I am therefore, clearly of opinion, that the verdict for the Plaintiff should stand.

BURROUGH J. I consider this as more a question of fact than of law. The question is, whether the contract was proved as laid. It was so proved; and, after *Fisher* had introduced the parties, and stated the purpose for which the Plaintiff wanted the copper, the Defendants warranted the article by undertaking to serve the Plaintiff well. The allegation in the declaration, that the copper was manufactured by the Defendants, is sufficiently distinct; it is of the very essence of the case, and the Plaintiff must have been nonsuited if he had failed to prove it. The declaration states, that the Defendants sold, for the sheathing a ship, copper which had been manufactured by themselves, and falsely and fraudulently warranted it fit for the purpose. Now, in the case of the *King v. Boyall* (a), objection was taken to an indictment against a parishioner for not sending out carts to highway labour; that the allegation touching the order of the surveyors only mentioned them as *being* surveyors, without adding

(a) 2 Burr. 832.

when

when and how they were appointed; but Lord *Mansfield* held that *being* was a sufficient averment.

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The Defendants knew what the copper was wanted for, and made it; and the whole of the tenth count is proved, except the word *fraudulent*, which is not material where it is also expressly stated and proved that the Defendants falsely warranted. The copper, instead of lasting four or five years, lasted only one voyage, and this was proved to have been occasioned by a defect in the manufacture.

I cannot comprehend why the action should not lie. I put it on the ground of an express warranty and the finding of the jury that the copper was insufficient, and am of opinion that the verdict for the Plaintiff must stand.

GASELEE J. The case has been so fully gone into, that I shall make only one or two observations. Without enquiring whether the warranty here be express or implied, it is clear that where goods are ordered for a particular purpose, the law implies a warranty that they are fit for that purpose. That was taken for granted in *Fisher v. Samuda*; and though the plaintiff, who complained of the insufficiency of goods sold him, did not recover in that case, that was because he had never objected to the quality of them in an action which had been brought for the price, and had been conducted to judgment against him. It has been argued, that the counts on which the plaintiff has recovered in this case do not state a sufficient contract of warranty. If so that may be urged in error; but the counts could not easily have been framed otherwise, as it is never clear, on the face of a declaration, whether the warranty to be proved is express or implied.

How far the case might have been altered if the Defendants had not manufactured the copper, I do not say; but

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but as to the warranty, the declaration could scarcely have been other than it is. The rule which has been obtained on the part of the Defendants must be discharged.

Rule discharged.

May 19.

HUNT v. DE BLAQUIERE.

A husband separated from his wife by a divorce *a mensâ et thoro*, for adultery on his part, with a decree of alimony, is liable for necessities supplied to the wife, if he omit to pay the alimony.

2. Furniture of a house held to be necessities for a female, to whom the Court had decreed 380*l.* a year alimony.

THIS was an action to recover the value of furniture for a house supplied by the Plaintiff to the Defendant's wife; who had for some years been living separately from her husband under a sentence of divorce *a mensâ et thoro* pronounced on the ground of adultery proved against the husband. As she was the daughter of a marquis, and had brought him a fortune of 6000*l.*, he was ordered by a decree for alimony to allow her 380*l.* a year for her maintenance. At the trial before Best C. J., *Middlesex* sittings after *Michaelmas* term, it appeared that previously to the separation the lady had been treated with cruelty and turned out of doors. And there was no evidence that more than 695*l.* of the alimony had been paid since the date of the decree, 1820. From that time the Defendant had resided in *France*. The furniture in respect of which the Plaintiff sought to recover had been supplied in 1827.

The Chief Justice, after stating that a man who turned his wife out of doors gave her an implied credit for necessities, directed the jury to consider whether the goods furnished by the Plaintiff to Defendant's wife were necessary according to her station, and for a style of living not exceeding 380*l.* a year.

The

The jury found that the Defendant had struck his wife and turned her out of doors, and gave a verdict for the whole of the Plaintiff's demand, 230*l*.

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Spankie Serjt. obtained a rule *nisi* to set aside this verdict and enter a nonsuit instead, upon the ground that, after the decree for alimony in the spiritual court, the husband was not liable to be sued at common law; and that furniture for a house was not necessary for a divorced wife with an income of 380*l*. a year, who ought rather to live in ready-furnished lodgings.

Wild and *Russell* Serjts. shewed cause.

The divorce *a mensâ et thoro*, and the decree of alimony, do not, at least unless the alimony be paid, discharge the husband from the implied credit which the wife always has for necessaries. Such a divorce neither constitutes her a *feme sole*, nor invests her with any of the attributes of a *feme sole*. She can neither sue nor be sued as such, and there is no alteration in her condition except to justify her in living separate. *Marshall v. Rutton* (a), *Ellagh v. Leigh* (b), *Lewis v. Lee* (c).

The decree of alimony is for the benefit of the wife, not for the protection of the husband; to give her a remedy direct against him; not to deprive her of the usual credit by which she is to obtain necessaries. If the husband pay the alimony, perhaps he might plead such payment as an answer to any further liability: here he has not paid the amount for a single year. But in *Thompson v. Harvey* (d), it was holden that a pension from the crown would not discharge the husband's liability. In *Manby v. Scott* (e), the wife had quitted her husband under circumstances of great impropriety,

(a) 8 T. R. 545. (b) 5 T. R. 679. (c) 3 B. & C. 291.
(d) 4 Burr. 2177. (e) 1 Lev. 4. 1 Mod. 124. 1 Sid. 109.

which

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which of themselves would have been sufficient to have discharged his liability; but the decision of the Court turned upon the notice which he had given to the particular creditor who sued. And even *Hyde J.*, who thought the husband not liable, relied mainly on the circumstance that the wife had eloped from her husband, and there was no proof of her repentance. (a) “The wife ought to be a penitentiary before the husband is bound to receive her, or give her any maintenance: and no such thing appears or is found in the verdict in our case. If a woman be of so haughty a stomach that she will choose to starve rather than submit and be reconciled to her husband, let her take her own choice: the law is in no default, which doth not provide for such a wife. If a man be taken in execution, and be in prison for debt, neither the plaintiff at whose suit he is arrested nor the sheriff who took him is bound to find him meat, drink, or clothes; but he must live on his own, or on the charity of others: and if no man will relieve him, let him die in the name of God, says the law; and so say I. If a woman, who can have no goods of her own to live on, will depart from her husband against his will, and will not submit herself to him, let her live on charity, or starve in the name of God: for in such case the law says her evil demeanor has brought it upon herself, and her death ought to be imputed to her own wilfulness.” Where the wife is innocent, the Court always enquires whether the object of alimony or a separate maintenance has been attained; not whether the mere forms have been gone through. *Barrett v. Booty* (b), *Nurse v. Craig*. (c) In the latter case, *Chambre J.* says, “Of what use is the covenant for an allowance if the maintenance be not paid? — it does not

(a) 1 *Mod.* 132.(b) 8 *Taunt.* 343.(c) 2 *N. R.* 153.

give a credit to the wife, for no action can be brought against her."

If the husband be liable for necessaries, the nature of them must depend on the degree of the parties; *Ozard v. Darnford* (a); and it was a prudent thing on the part of the Defendant's wife, rather to purchase furniture for a small house than incur the greater expense of ready-furnished lodgings.

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Spankie and *Stephen Serjts. contra*. Although a divorce *a mensâ et thoro* does not dissolve the *vinculum matrimonii*, it gives the husband and wife separate rights, acknowledged as such in the ecclesiastical courts, and distinct characters, which the common law courts are obliged to recognise in various ways. For instance, a woman so divorced cannot be guilty of bigamy (b); and children born a certain period after the divorce are deemed illegitimate. She is not entitled to administration of her husband's effects, and he can no longer release her rights. *Chamberlaine v. Hewson* (c), *Motteram v. Motteram*. (d) By taking a decree, therefore, in the ecclesiastical court, the wife has made her election, and must rely on that as her remedy. *Expressum facit cessare tacitum*: the implied liability of the husband at common law is merged in his express liability under the decree, and cannot again be resorted to, unless the decree be proved unavailing from the contumacy of the husband. But if the decree be the proper remedy for the wife, the tradesman who supplies her stands in her place, and cannot be in a better condition: he claims only under her, and his course is, through her, to enforce the decree. Upon the strength of that he gives her credit; and unless that be shewn to be unavailing, the husband

(a) *Selw. N. P.* 260.

(b) *Pr. in Cb.* 111.

(c) *5 Mod.* 70.

(d) *3 Bulstr.* 264.

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ought not to be harassed by actions. When there is such a decree, it cannot be inferred that the wife is left to starve, unless it be shewn that the decree could not be put in force. Besides, she has, at common law, her writ *de estoveriis habendis*. The decision in *Manby v. Scott* did not turn altogether on the notice to the particular tradesmen; for *Hyde J.* thought that the wife ought to have applied to the spiritual court, and altogether disclaimed the husband's liability at common law. (a) "If the contract or bargain of the wife, made without the allowance or consent of the husband, shall bind him upon pretence of necessary apparel, it will be in the power of the wife (who, by the law of God and of the land, is put under the power of the husband, and is bound to live in subjection unto him), to rule over her husband, and undo him, maugre his head, and it shall not be in the power of the husband to prevent it. The wife shall be her own carver, and judge of the fitness of her apparel; of the time when it is necessary to have new clothes, and as often as she pleaseth, without asking the advice or allowance of her husband: and is such power suitable to the judgment of Almighty God, inflicted upon woman for being first in the transgression? 'Thy desire shall be to thy husband, and he shall rule over thee.' Will wives depend upon the kindness and favour of their husbands, or be observant towards them, as they ought to be, if such a power be put into their hands? Admit that in truth the wife wants necessary apparel, woollen and linen, and thereupon she goes into *Paternoster Row*, to a mercer, and takes up stuff, and makes a contract for necessary clothes; thence goes into *Cheapside*, and takes up linen there in like manner; and also goes into a third street, and fits herself with ribands and other necessities suitable to her occasions and her husband's degree. This done, she goes away, disposes of the com-

(a) 1 *Mod.* 127, 128. 138.

modities to furnish herself with money to go abroad to *Hyde Park*, to score at *gleeke*, or the like. Next morning this good woman goes abroad to some other part of *London*, makes her necessity and want of apparel known, and takes more wares upon trust, as she had done the day before; after the same manner she goes to a third and a fourth place, and makes new contracts for fresh wares, none of these tradesmen knowing or imagining she was formerly furnished by the other, and each of them seeing and believing her to have great need of the commodity sold her; shall not the husband be chargeable and liable to pay every one of these, if the contract of the wife doth bind him? Certainly, every one of these hath as just cause to sue the husband as the other; and he is as liable to the action of the last as the first or second, if the wife's contract shall bind him; and where this will end no man can divine or foresee. It is objected, that the jury is to judge what is fit for the wife's degree; that they are trusted with the reasonableness of the price, and are to examine the value and also the necessity of the things or apparel. Alas! poor man! what a judicature is set up here to decide the private difference between husband and wife! The wife will have a velvet gown and a satin petticoat, and the husband thinks mohair, or farendon for a gown, and watered tabby for a petticoat is as fashionable and fitter for his quality. The husband says, that a plain lawn gorget, of ten shillings, pleaseth him, and suits best with his condition; the wife will have a Flanders lace, or point handkerchief, of forty pounds, and takes it up at the exchange. A jury of mercers, silkmen, semsters, and exchange-men, are very excellent and very indifferent judges to decide this controversy: it is not for their avail and support to be against the wife, that they may put off their braided wares to the wife, upon trust, at their own price, and then sue the husband for the money.

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Are not a jury of milliners and drapers bound to favour the mercers or exchange-men to-day, that they may do the like for them to-morrow?"

Mansfield C. J. was of the same opinion, in *Nurse v. Craig*, and in *Keegan v. Smith*. (a) Lord *Tenterden* was of opinion, that after a decree for alimony, an action did not lie against the trustees of the wife.

Then, upon the question of necessities, even if the wife were living with her husband, furniture for a house is one of those greater matters which she could not properly take upon herself without his direct sanction; but when she is living separately, and on a small fortune, it cannot be necessary that she should go to such an expense, when furnished lodgings would suit her circumstances better. But what is necessary in such a case is, in other words, what it is reasonable she should have in her station; and what is reasonable is always a question for the Court. In *Smith v. The Sheriff of Middlesex* (b), the Court thought the furniture of a house not necessities for a married woman living separate from her husband, and adjudged the property therein, as against an execution creditor, to remain in the tradesman who supplied it.

BEST C. J. This was an action to recover the price of household furniture provided by the Plaintiff for Lady *Harriet de Blaquiere*, the wife of the Defendant. A verdict was found for the Plaintiff, upon which a motion has been made to set it aside and enter a nonsuit instead on two grounds: First, that a decree of the ecclesiastical court, assigning alimony to Lady *Harriet*, is an answer to the action; and, secondly, that the articles supplied were not necessary for a person in her situation.

(a) 5 B. & C. 375.

(b) 15 East, 609.

The jury found that the Defendant had stricken his wife, and turned her out of doors.

If a man turns his wife out of doors, it has been said by judge after judge, that he sends her forth with an implied credit for necessaries. This is the general law, and the Defendant is liable under it, unless the obligation cast on him by turning his wife out be discharged by something subsequent. It has been asserted that the decree for alimony is a discharge; but no decision has been cited which can be said to establish that proposition. In *Manby v. Scott*, though some of the opinions of some of the judges seem favourable to such a position, the point decided was far different. That was a case in which necessaries had been furnished to a woman who had eloped from her husband—I infer criminally, because the word eloped is never used in any other sense:—her husband refused to receive her again, and the judges held he was not liable for necessaries. That case has been recognised in subsequent decisions; and it was again laid down in *Govier v. Hancock* (a), that the husband is not liable where the wife deserts him criminally. Undoubtedly, in *Manby v. Scott*, some of the judges say that the wife should apply to the ecclesiastical court; but that such is her only resource is contradicted by all the practice of *Westminster Hall*; for if it were so, none of the actions which have been brought by tradesmen for necessaries furnished to the wife could have been sustained.

Although we entertain great respect for the opinions of Chief Justice *Hale*, the answer given by Mr. Justice *Twisden* is conclusive—“Is the wife to starve?” and it is not necessary in such a case to imply agency on the part of the wife: the husband is at all events liable: this we might lay down on principle, even if there

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(a) 6 T. R. 603.

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were no decision on the point. But *Nurse v. Craig* is an express authority: and the opinion of the three judges in that case is confirmed by *Gibbs C. J.* and the rest of the Court in *Barrett v. Booty*. But it has been argued that by taking the decree in the ecclesiastical court, the wife makes her election: and so she does where she accepts a provision for a separate maintenance, as in *Nurse v. Craig*. But it is not the decree or the deed that discharges the husband, but the observance of it. There never was a case in which such an argument could be adduced with less plausibility than in the present. It has been said, indeed, the husband is only liable when shewn to be contumacious; but if he be ordered to pay alimony on a particular day, he is contumacious as soon as he omits to pay at the appointed time. The ecclesiastical court orders the defendant in 1820 to pay his wife 380*l.* a year (only 80*l.* a year beyond her own fortune), and in 1829 he had paid altogether no more than 695*l.* As to the writ *de estoveriis habendis*, the wife's being entitled to that does not carry the matter further than her right to sue in the ecclesiastical court. The tradesman has still his action, for he cannot compel her to sue. I am therefore of opinion, that the defendant is not discharged from his liability. Whether the articles furnished by the Plaintiff were necessaries, was a question for the jury. I put it to them whether, with an income of 380*l.* a year, it was fit that the defendant's wife, the daughter of a marquis, should hire a house, or whether she was bound to live in furnished lodgings. They thought it not proper that a person in her station should be compelled to live in lodgings, and I am satisfied with their verdict.

PARK J. I concur in the opinion which has been given. The question is, Whether a deed of separate maintenance, or a decree for alimony, will discharge
 a hus-

a husband from liability, when the sum secured by the deed or decree is not paid? and I am of opinion it will not. The Defendant forced his wife from his house, with circumstances of cruelty; he was divorced from her for adultery committed by himself; and he has complied very little with the decree for alimony. But he is bound to provide for his wife; and all the cases shew that the alimony must not only be secured but paid. In this the text writers all concur. *Bacon's Abridgment* (a) contains the whole of the judgment of *Hale C. J.* in *Manby v. Scott*, and the summary which the learned compiler extracts from it is as follows:—

“ It is clear that a husband is obliged to maintain his wife, and may by law be compelled to find her necessities, as meat, drink, clothes, physic, &c. suitable to the husband's degree, estate, or circumstances. It seems also settled, that the wife is not to be her own carver, and that she hath not an absolute power of binding the husband by any contract of hers, though for necessities, without his assent precedent or subsequent. The law, therefore, in these cases, as it seems established by usage and practice, is to leave it to the jury to find whether the husband consented or not; and though no express consent or agreement of his be proved, yet if it appears that she cohabited with her husband, and bought necessities for herself, children, or family, the husband shall be chargeable, and the jury may find, on their oaths, that they came to the husband's use, he being by law obliged to provide for them: also, if she cohabits with her husband, and is ever so lewd, he shall be liable for her necessities, for he took her for better for worse: so if he runs away from her, or turns her away, or forces her by cruelty or ill usage to go away from him: but if he allows her a separate maintenance, or prohibits par-

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ticular persons from trusting her, he shall not be liable during the time that he pays such separate maintenance, nor for necessaries taken up of those persons particularly prohibited; for in these cases no consent, but rather the contrary, appears: but a general warning or notice in the *Gazette*, or other newspaper, not to trust her, is not a sufficient prohibition; also the jury are to determine as to the wife's necessity, the husband's degree and circumstances, and the value of the things sold and delivered, and give a verdict and assess damages accordingly."

I do not feel it necessary to differ from the decision in *Manby v. Scott*. There, the wife eloped, lived away several years, and the husband refused to receive her again; and *Hyde J.* refers to the case of the Prodigal Son; so that it is clear the wife had been living improperly. In *Nurse v. Craig*, it is true, the judges did not all agree; but the opinion of *Heath J.* is the more important, as he had originally thought differently; and *Chambre J.* puts the case expressly on the ground that the separate maintenance had not been paid. He says, "If reason, justice, or humanity ought to govern in the present case, I think it my duty to consent to the allowance of this action, since all the reasons upon which exceptions to this kind of action have been founded, totally fail in the present instance."

No distinction can be drawn between maintenance under a separation deed, and maintenance by virtue of a decree for alimony. It has been urged, indeed, that the wife should enforce the decree of the ecclesiastical court; but, in order to do that, she must first obtain money, and it would be difficult to execute a writ *de excommunicato capiendo* while the husband is in a foreign country. *Nurse v. Craig*, therefore, is a much stronger case than the present, because the trustee might have sued for the allowance. Perhaps a jury would

would not be permitted to say whether or not the allowance was sufficient; but whether or not articles supplied are necessary, is a question within their province. *Keegan v. Smith* has no bearing on the subject of discussion; for the wife must starve unless we decide in favour of the Plaintiff. No answer has been given to *Ozard v. Darnford*, where Lord *Mansfield* expressly draws the distinction between an allowance agreed for and an allowance paid. In his charge to the jury in that case, he laid it down, as clear and decided law, "That when husband and wife live together, the husband is liable for all such necessaries wherewith the wife may have been furnished; but that what are or are not necessaries must depend on the rank and situation of the husband: that where they live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual court, or court of equity, will compel him to grant her an adequate alimony. But if she elope from her husband, and live in adultery — or if, upon separation, the husband agrees to make her a sufficient allowance, *and pays it* — in either of those cases the husband is not liable; because in the former case she forfeits all title to alimony, and, in the latter, has no further demands on her husband. And as in all cases the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict enquiry as to the terms of separation; for, in such cases, he must trust her at his peril."

In a similar case of *Turner v. Winter (a)*, his Lordship nonsuited the plaintiff, because, on separation, the defendant had agreed to make an allowance to his wife and had regularly paid it, notwithstanding the plaintiff

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had no notice of the transaction. But the allowance must be sufficient, according to the degree and circumstances of the husband; and the adequacy of the allowance is a question of fact for the jury. *Hodgkinson v. Fletcher.* (a)

BURROUGH J. Tradesmen must look to the circumstances of the wife, and of her separation from her husband. If the husband turns her out of doors, he is liable for necessaries; if she elopes, she can claim neither maintenance nor dower. Here there is no imputation on the wife: the husband beats and turns her out of doors, and all the wrong is on his side: he is ordered to pay alimony, and now attempts to avail himself of his own wrong, and because he omits to pay the alimony, refuses to pay the tradesman. To permit him to act in such a way would be contrary to all principle. The writ *de estoveriis habendis* is only in lieu of alimony, and does not affect the right of the tradesman to sue,—or all the practice of *Westminster Hall* is wrong. The husband is not discharged unless he pay the alimony or separate maintenance; and there is no difference whether the provision be by deed or decree. As to the objection that the articles supplied were not necessaries, the defendant's wife must have a house to live in, and if so, could not dispense with tables and chairs. It was incumbent on the Defendant to shew that he had paid the alimony, and not on the Plaintiff to shew that it was unpaid.

GASELEE J. There is no case in which the wife has been precluded from obtaining credit for necessaries, where the husband has turned her out of doors, or has so conducted himself that a decent woman could not remain with him. On the contrary, in *Ozard v. Darn-*

(a) 4 Camp. 70.

ford,

ford, Lord *Mansfield* says, “ In all cases the creditor is to be considered as standing in the wife’s place. It imports him, when the wife lives apart from her husband, to make strict enquiry as to the terms of separation ; for in such cases he must trust her at his peril.”

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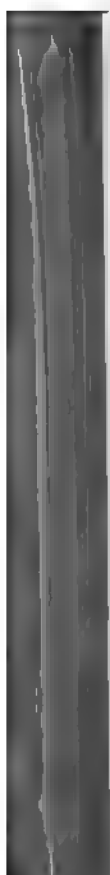
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In deciding thus, we shall not, as it has been argued, go beyond the decision in *Nurse v. Craig*, because if the objection to the form of action in that case had prevailed, I should still say that an action would lie.

The rule for a nonsuit must be

Discharged.

END OF EASTER TERM.



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ACTION ON THE CASE.

1. An individual who has suffered loss in consequence of the decay of sea-walls, which a corporation is directed to repair under the terms of a grant from the crown conveying a borough, and pier or quay with tolls, to the corporation, may sue the corporation for damages. *Henley v. The Mayor and Burgesses of Lyme.* Page 91
2. F., who had hired a ship and its tackle of the Plaintiff for three voyages, at the end of the first, being apprehensive of a seizure under the process of an admiralty court, placed the cables and anchors on the Defendant's wharf, alongside of which the ship lay. The ship was then seized for seamen's wages and a debt on bottomry, and shortly afterwards was sold under admiralty process, without the anchors and cables.

Two days before the sale, the Plaintiff demanded of the Defendant the anchors and cables on his wharf, which the Defendant, holding them from F., refused to give up:

Held, that on this demand, previous to the sale, the Plaintiff could not sue the Defendant for the anchors and cables in trover, although they had not been removed out of the ship in the ordinary course of business: Held, also, that the removal of them from the ship to the wharf, whereby they escaped the admiralty sale, was no injury to the Plaintiff's reversionary interest. *Ferguson v. Christal and Another.*

Page 305

3. The Plaintiff purchased from the warehouse of the Defendant, the manufacturer, copper for sheathing a ship. The Defendant, who knew

knew the object for which the copper was wanted, said, "I will supply you well."

The copper, in consequence of some intrinsic defect, the cause of which was not proved, having lasted only four months, instead of four years, the average duration of such an article :

Held, in an action on the case, in the nature of deceit, that the Plaintiff was entitled to damages. *Jones v. Bright.* Page 533

AFFIDAVIT TO HOLD TO BAIL.

See PRACTICE, 8.

AGENT.

See EVIDENCE, 3.

ALLUVIAL LAND.

Land, not suddenly derelict, but formed by alluvion of the sea, imperceptible in progress, belongs to the owner of the adjoining demesne lands, and not to the crown. *Sir Robert Gifford v. Lord Yarborough.* Page 163

AMENDMENT.

See PLEADING, 7. PRACTICE, 10.

ASSUMPSIT.

1. A written agreement, "to remain with A. B. two years for the purpose of learning a trade," is not binding, for want of an engagement in the same instrument by A. B. to teach. *Lees v. Whitcomb.*

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AWARD.

2. A child at school, for whom payment had been made quarterly, was sent home for illness four days after the commencement of a quarter, and did not return: Held, that the master was entitled to a whole quarter's schooling, although there was no express contract for a quarter's notice or a quarter's pay, and although the school was a day-school, at which the child was the only boarder. *Collins v. Price.* Page 132

AWARD.

See PRACTICE, 4.

1. The objections against an award ought to be specified in a rule nisi obtained for the purpose of setting it aside; but an omission in that respect is not conclusive to preclude the Court from entertaining the objections.

2. Upon a declaration of eleven special counts for negligence, and common counts for money paid, &c., an arbitrator, under an order of *Nisi Prius*, found that the Plaintiff had "good cause of action for 23*l.* 14*s.* 10*d.*," and directed a verdict to be entered up for that sum: Held, sufficiently certain. *Dicas v. Jay.* 281

BAIL-BOND.

See PLEADING, 2. 5.

BANKER'S BOOK.

See EVIDENCE, 4.

BANKRUPT.

BANKRUPT.

1. The Court of C. P. has not authority under the 6 G. 4. c. 16. s. 96. to compel parties to enrol the proceedings under a commission of bankrupt. The application must be made to the Court of Chancery. *Johnson v. Gillett.* Page 5

2. Bankruptcy and certificate are no bar to an action in *tort* against a broker for selling out Plaintiff's stock contrary to orders. *Parker v. Croll.* 63

3. By charter-party *B.* hired a ship to convey a cargo to *Hayti*, and engaged to find a cargo for the homeward voyage. On the ship's arrival at *Hayti*, *B.* assigned the cargo to *C.* as a security for advances made by him. The hire of the ship not having been paid, Defendants, the owners, under the judgment of a court at *Hayti*, attached the cargo in the hands of *C.* to discharge Defendants' claim for the hire. *B.* having declined to find a cargo for the homeward voyage, the captain procured one for Defendants, who received the freight on its arrival in *London*;

B. having, subsequently to the said assignment, become bankrupt, Held, that his assignees could not recover from Defendants the proceeds of the cargo attached at *Hayti*, or of the homeward freight. *Kymer and Others, Assignees, v. Larkin and Another.* 71

4. 1. A payment made in *June* 1825 by a debtor, *bonâ fide*, without

intention of fraudulent preference, eight days before a commission of bankrupt was issued against him, Held to be protected under the eighty-second section of 6 G. 4. c. 16.

2. The debtor, a prisoner, went eight days before a commission of bankrupt was sued out against him, to a fire-office, to receive money, payable to him in respect of a loss by fire; a creditor, for labour done, who knew the time when the money was to be paid, without any intimation from the debtor, met him at the office, and obtained out of the sum so received a payment of his own debt, not knowing that his debtor was a prisoner or insolvent; a jury having negatived fraud, Held, that this was not a fraudulent preference by the debtor. *Churchill and Another, Assignees of Cadogan, a Bankrupt, v. Crease.* Page 177

5. A chariot was built to Plaintiff's order, and paid for by him: when finished in other respects, Plaintiff ordered a front seat to be added; but the builder being slow in making this addition, Plaintiff sent for the chariot repeatedly, and the builder promised to deliver it. Plaintiff being afterwards dissatisfied, ordered the chariot to be sold, and while it was, according to the custom of the trade, standing in the builder's warehouse for that purpose, the front seat not having been added, the builder became a bankrupt, and his assignee seized the chariot. More than three

three months afterwards the Plaintiff commenced his action :

Held, first, that the Plaintiff had sufficient property to maintain trover; secondly, that the chariot did not pass to the assignee as being in the order and disposition of the bankrupt with the consent of the owner; and, thirdly, that the assignee was not within the protection of the forty-fourth section of 6 G. 4. c. 16., which limits actions to three months after the fact committed.

Carruthers v. Payne, Assignee of Thompson, a Bankrupt. Page 270

6. The bankrupt act, 6 G. 4. c. 16. s. 82., is retrospective.

Therefore, where the bankruptcy took place June 26. 1822, and the bankrupt paid the Defendant, who knew of his insolvency, a sum of money August 4. 1822, and a commission was sued out against the bankrupt in May 1823: Held, that the assignees could not, subsequently to the time when the 6 G. 4. c. 16. came into operation, sue the Defendant for money had and received. *Terrington, Assignee of Pullan, a Bankrupt, v. Hargreaves and Others. Page 489*

BARON AND FEME.

1. A husband, who supplies his wife with necessaries in her degree, is not liable for debts contracted by her without his previous authority or subsequent sanction. *Seaton v. Benedict. 28*
2. Where a Plaintiff furnished Defendant's wife with articles of dress, which were rendered un-

BILL OF EXCHANGE.

necessary by the Defendant's having supplied her wardrobe amply, and in an action for the price of the articles (18*l.* 5*s.* 6*d.*) the jury found a verdict for Plaintiff, damages 10*s.*, the Judge certified to deprive him of costs.

Seaton v. Benedict. Page 187

3. 1. A husband separated from his wife, and a divorce, *a mensâ et thoro*, for adultery on his part, with a decree of alimony, is liable for necessaries supplied to the wife, if he omit to pay the alimony.

2. Furniture of a house held to be necessaries for a female, to whom the Court had decreed 380*l.* a year alimony. *Hunt v. De Blaquiere. 550*

BILL OF EXCHANGE.

1. Defendant accepted a bill of exchange drawn by C., who indorsed it to his bankers: they entered it on the credit side of C.'s account, but the bill having been dishonoured, entered it afterwards on the debit side. A few days after the dishonour, Defendant paid to C. the amount of the bill, but omitted to take it out of the banker's hands.

C. subsequently paid into the banker on his general account more than enough to cover all the items of the account preceding the bill item, and that item also, and the bankers, for a space of three years, treated the bill as paid; they then sued Defendant on his acceptance:

Held, that he was not liable. *Field and Others v. Carr. 13*

2. A

CARRIER.

2. A bill of exchange, drawn in *America* on a house in *London*, payable to order, was endorsed by the payee generally to *A.*, and by him in these words: "Pay to *B.*, or his order, for my use." *B.* applied to his bankers to discount the bill, and they, without making any enquiry, did so, and applied the proceeds to the use of *B.*:

Held, that the endorsement was restrictive; that the property in the bill remained in *A.*, and that he was entitled to recover the amount from the bankers. *Lloyd and Others v. Sigourney.*

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BOSTON ACT.

See EVIDENCE, 7.

BYE-LAW.

1. In a company constituted by letters-patent, with power to make reasonable bye-laws, a bye-law for the steward to provide a dinner for certain members of the company on Lord Mayor's day, with an allowance for doing so, or to pay a fine of 20*l.*, or excuse himself by swearing he is not worth 300*l.*, is a bad bye-law. At all events,

2. The allowance is a condition precedent, and ought to be averred. *Carter and Others v. Sanderson.*

79

CARRIER.

1. A notice that the proprietor of a general coach-office will not be

CHAMPERTY. 569

responsible for the carriage of parcels of more than 5*l.* value, unless entered as such, will not avail the proprietor of a *coach* who takes a parcel from the office, unless it be otherwise shewn that he is connected with the office.

2. The carrier's agent telling the female servant of the owner of a parcel above that value, that it ought to be insured: Held, not a sufficient notice of the limitation of the carrier's responsibility. *Macklin v. Waterhouse and Others.*

Page 212

2. *Semble*, That where carriers run a coach from *A.* to *B.* and back, notice that they limit their responsibility on the carriage of parcels from *A.* to *B.*, is notice that they limit it likewise from *B.* to *A.* *Riley and Others v. Horne and Others.*

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CERTIFICATE.

See BANKRUPT, 2.

CHAMPERTY.

An agreement between the seller and purchaser of an estate, that the purchaser, bearing the expence of certain suits commenced by the seller against an occupier for arrears of rent, should have the rent to be so recovered, and any sum that could be recovered for dilapidations; and that the purchaser, bearing the expences, might use the seller's name in actions he may think fit to commence against the occupier for arrears

570 COMPOSITION-DEED.

arrears of rent or dilapidations, is not void, as savouring of champerty. *Williams v. Protheroe*.

Page 309

COMPOSITION-DEED.

1. Plaintiff had refused to sign an agreement to receive of his debtor a composition of 10s. in the pound; but the debtor's brother offering to supply him with coal to the amount of the other 10s., he signed the composition-agreement.

The other creditors knew nothing of the coal transaction.

Plaintiff having been supplied with the coals,

Held, that he could not recover upon a promissory note for the amount of the 10s. composition. *Knight v. Hunt*. 432

2. Plaintiff, holding two bills drawn by Defendant, one for 400*l.*, the other for 156*l.* 19*s.* 10*d.*, executed a composition-deed, containing a general release of the Defendant, and a schedule of the sums due to various creditors who executed the deed. After the Plaintiff's name was put the sum of 156*l.* 19*s.* 10*d.* only, at the request of the Defendant, who expected the Plaintiff would recover the bill for 400*l.* by suing the acceptor. The other creditors were not made acquainted with the fact, that the Plaintiff had a debt of 400*l.* as well as 156*l.* 19*s.* 10*d.*:

Held, he could not afterwards sue Defendant on the bill for 400*l.*

COSTS.

Gaselee J. dissentiente. Britten and others v. Hughes. Page 460

CONFIRMATION.

See CROSS REMAINDER, 2.

CONVEYANCE.

See MORTGAGE, 2. 1, 2.

Where commissioners, under an inclosure, made an allotment in respect of *R.*'s land in 1824, Held, that the allotment passed by a subsequent conveyance of the land in 1824, although the commissioners' award was not executed till 1827. *Doe dem. Dixon and Another v. Willis and Another*. 441

COSTS.

See PRACTICE, 3. MORTGAGE, 2. 1.

1. Arrest for 100*l.* Verdict for Plaintiff, subject to an award; costs to abide the event: 39*l.* 18*s.* found to be due, and the transactions between the parties, complicated. The Court refused to allow the Defendant his costs under 43 *G.* 3. *Turner and Another v. Prince*. 191
2. Trespass *qu. cl. fr.*; pleas, not guilty, and justifications under a right of way. Issue joined on not guilty; right of way traversed, and issue joined thereon. New assignment and judgment by default thereon. Verdict for Plaintiff 1*s.*, on issue of not guilty; 40*s.* damages on the new assignment; verdict for Defendant, on one of the justifications:

Held,

Held, that the plaintiff was entitled to the general costs in the cause. *Vickers v. Gallimore*.

Page 196.

CROSS-REMAINDER.

1. Where, by a very obscure and illiterate will, property was left to devisor's four grandsons, "and to the heirs males of the said grandsons, and then to the grandsons' heirs males that part that belonged to their father, and then to the last liver to the heirs males of the said grandsons, and for want of issues males of the grandsons," over; the Court implied cross-remainders.

2. The heir in tail received for ten years' rent under a lease for ninety-nine years granted by his ancestor: Held, a confirmation of the lease. *Doe dem. Southouse v. Jenkins and Another*. 469

CUSTOM.

See TOLL.

CUSTOM ECCLESIASTICAL.

See EVIDENCE, 8.

DEED.

See EVIDENCE, 2. 2.

1. The Defendant executed a deed, conveying his property to trustees to sell for the benefit of creditors, the particulars of whose demand were stated in the deed;

a blank was left for one of the principal debts, the exact amount of which, being subsequently ascertained, was inserted in the blank the next day, in the Defendant's presence, and with his assent. He afterwards recognised the deed as valid in various ways, particularly by being present when it was executed by his wife, and by joining her in a fine to enure to the uses of the deed: Held, that the deed was valid, notwithstanding the filling up of the blank after execution.

2. The attorney who had prepared the deed, on the retainer of the trustees, was held a competent witness in an issue directed by the Court to try its validity, although one of the trusts was to defray the charges of preparing the deed, and although he was Defendant in another action, his success in which depended on the validity of the deed.

At all events, in such an issue, the Defendant was held not entitled to a new trial, on account of the admission of the testimony of such witness, justice having been done. *Hudson v. Revett*.

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DEMURRAGE.

See SHIPPING.

DEVISE.

1. Devise to *J. H. L.* (devisor's eldest son) for life; remainder to trustees to preserve, &c.; remainder to *J. H. L.*'s second, third, fourth, fifth, and all and every

every other the son and sons of the body of *J. H. L.* severally and successively in seniority of age in tail male; remainder to devisor's second and other sons successively in tail male; remainder to first and other daughters of the body of *J. H. L.* successively in tail general; remainder to devisor's eldest daughter, *M. S. L.*, for life; remainder to trustees to preserve, &c.; remainder to her first and other sons successively in tail male; remainder to her first and other daughters successively in tail general; like remainders for life (with remainder to trustees to preserve, &c.) to devisor's other daughters successively, with like remainders in tail to their respective children; remainder to devisor's sister in fee; various terms to trustees to raise money; and a power to the party in possession of the premises devised, to charge them for the portions and maintenance of younger children, male and female, accompanied with a provision, that in case of any younger child's obtaining a portion, and afterwards becoming entitled to the premises devised, the portion of such younger child should go over to the other younger children: Held, that the eldest son of *J. H. L.* took an estate tail in the premises expectant on the death of *J. H. L.* *Langston v. Pole and Others.* Page 228

2. Devise, that *J. B.*, a trustee for devisor, shall grant the premises to *J. B.*'s son *G. B.*, to enter on

after the death of *J. B.*, and that *J. B.* and *G. B.* shall within one month after devisor's decease pay 100*l.* to *W. T.* and *T. B.* to discharge legacies; and if they omit to do so, that *W. T.* and *T. B.* shall let the premises and raise the 100*l.* out of the rent, they keeping the deeds of the premises, and not allowing *J. B.* and *G. B.* to sell or mortgage till the legacies be paid and *G. B.* be twenty-one years of age; and that if *G. B.* die and leave no child lawfully begotten of his own body, *W. T.* and *T. B.* shall sell the premises and divide the proceeds among brothers, &c.: Held, an estate tail in *G. B.* *Raggett v. Beaty.* Page 243

DISTRESS.

See LANDLORD AND TENANT, 3.

1. A landlord, to whom rent was in arrear, hearing his tenant and a stranger disputing about the property of an article on the premises, early in the morning entered and said, "The article shall not be removed till my rent is paid." The stranger, nevertheless, removed the article. On the same day, after the removal, the landlord sent his broker to distrain for the rent:

Held, that the distress was sufficiently commenced by the landlord to entitle him to the article in question. *Wood v. Nunn.* 10

2. Avowant, who had a term which expired on the 11th of November 1826, let the premises orally from the

the 11th of *September* to the 11th of *November* in that year, for 270*l.*, payable immediately:

Held, that this was a lease, of which parol evidence might be given, and not an assignment requiring a writing; but that being a demise of the whole of avowant's interest, he had no right to distrain. *Preece v. Corrie*. Page 24

3. A tenant distrained on for rent requested the broker not to proceed to sale, and engaged, in consideration of forbearance, to pay the broker's charges. Time was given, and the charges paid: Held, that this was not a voluntary payment, and that the charges, if irregular, might be recovered back in an action for money had and received. *Hills v. Street*. 37

DUCHY OF LANCASTER.

Although the Duchy of *Lancaster* is held by the king separately from his crown, a grant of duchy property is subject to the same incidents as a grant from the crown.

Therefore, an immediate grant to *A.* in fee, under the duchy seal, of property which was in the possession of *B.* under an unexpired lease from the duchy for years (such lease not being recited in the grant); was held void, notwithstanding there had been a user under the grant from the date of it (1631) to 1760. *Alcock v. Cooke and Another*. 340

EJECTMENT.

See ELEGIT, 2. MORTGAGE, 1.
VOL. V.

ELEGIT.

1. Where two *elegits* are issued the same day upon judgments signed in the same term, the sheriff may extend on each an entire moiety of the Defendant's land, although the judgments are at the suit of different Plaintiffs, and the inquisition on the second *elegit* recites, that a moiety has been extended on the first.
2. Where a party defends an ejectment as landlord, and the occupiers of the premises have suffered judgment by default, he cannot object that the occupiers have not received notice to quit from the lessor of the Plaintiff. *Doe d. Davies v. Creed*. *Doe d. Davies and Cheese v. Creed*.

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ENCLOSURE ACT.

See CONVEYANCE.

EVIDENCE.

See DEED, 2. LIMITATIONS.
PLEADING, 4. TOLL, 2. DUCHY OF LANCASTER.

1. In an action between *A.* and *B.*, the Court refused a rule to compel *B.* to produce, for the purpose of stamping, an agreement between *B.* and *C.*, although by an affidavit of *C.*'s it appeared that the act complained of by *A.* arose out of this agreement. *Lawrence v. Hooker*. 6

2. 1. Where a bishop has omitted to present to a living lapsed to
R r him

him for want of presentation within six months, a party who may present if the bishop omits to do so is not a competent witness for one who claims in the same right as such party.

2. A conveyance of a fourth part of an advowson in 1672, is not to be deemed voluntary, because the only pecuniary consideration expressed in the deed is twenty shillings.

3. An answer in Chancery, touching an advowson, filed by one who had been seised of the advowson twenty years after he had conveyed it away, Held, not admissible in evidence against a party who claimed the advowson through him. *Gully and Others v. Bishop of Exeter and Dowling.*

Page 171

3. Defendants' agents abroad, by order of Defendants, received money on Defendants' account, and stated the fact in a letter to Defendants. Defendants replied, acknowledging the receipt of the agents' letter, and giving them directions as to the disposition of the money :

Held, that the agent's letter was, coupled with the Defendants', admissible in evidence to charge the Defendants with the receipt of the money. *Coates and Another, Assignees, v. Bainbridge and Others.*

58

4. A banker's ledger is receivable in evidence to shew that a customer had no funds in the banker's hands. *Furness, Assignee of Alexandre Cope and Others, Bankrupts, v. William Cope.* 114

5. *Quære*, Whether, in an action for an injury to the reversion, the fact that an occupier holds as tenant to Plaintiff may be proved by oral evidence, where the occupier holds under a written agreement.

Best C. J. and Burrough J. neg.; Parke J. and Gaselee J. aff. Strother and Another v. Barr and Another. Page 136

6. Where a party sues on an instrument which on the face of it appears to have been altered, it is for him to shew that the alteration has not been improperly made. *Henman v. Dickinson.*

183

7. 1. *Semble*, That a postmark may be proved by any one in the habit of receiving letters by the post.

2. An action to recover the balance of an account is not within the *Boston Court of Conscience Act*, if the account originally exceeded 5*l.*, although the sum sought to be recovered is less than 5*l.* *Abbey v. Lill.* 299

8. 1. A bishop's register is evidence of the facts stated in it.

2. An allegation of a custom in *parishioners* to elect a curate is not supported by proof of such a custom in parishioners *paying church-rates.*

3. *Semble*, An ecclesiastical custom (which is not immemorial) will not, though acted on for a long time, deprive a rector of his common-law right to appoint his curate. *Arnold, Clerk, and Others v. The Bishop of Bath and Wells and Others.*

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9. Where

EVIDENCE.

9. Where Defendant surreptitiously obtained possession of an unstamped agreement executed by himself and the Plaintiff (thereby preventing the Plaintiff from affixing a stamp, as he had intended, in twenty-one days after execution), and then swore that he had lost the agreement, the Court ordered that he should produce a copy in his possession to the Plaintiff; and that if the Plaintiff produced that copy stamped at the trial, the Defendant should be precluded from producing the original. *Bousfield and Others v. Godfrey*. Page 418

10. 1. Where one of the attesting witnesses to a will is dead, witnesses may be called to his character.

2. Declarations of the testator in subversion of a will are not admissible in evidence, though both parties claim under him, and though they are offered with a view to shew the manner in which the will was executed. *Provis and Rowe v. Reed*. 435

11. Where the Plaintiff, in an action on a charter-party, had communicated to the attesting witness an interest in the adventure subsequently to the execution of the instrument: Held, that evidence of his handwriting was inadmissible. *Hovill v. Stephenson*.

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EXECUTOR.

See PLEADING, 6.

EXECUTION.

See ELEGIT, PRACTICE, 1, 2. 9.

FRIENDLY SOCIETIES. 575

FALSE IMPRISONMENT.

See TRESPASS, 2.

FRAUDULENT PREFERENCE.

See BANKRUPT, 4.

FRIENDLY SOCIETIES.

By the rules of a friendly society, a medical attendant was entitled to 3s. *per annum* from every member; and a committee of the society were authorised to settle all disputes, grievances, &c. relative to the affairs of the society, subject to an appeal to two magistrates.

The Plaintiff, who had been duly appointed medical attendant, was dismissed by the committee without any meeting of the members of the society at large, and another appointed. Upon an application to magistrates, they recommended a public meeting; which being convened accordingly, a large majority of the members voted for the Plaintiff, who thereupon sued the Defendant, the treasurer, for the 3s. received to the use of the medical attendant:

Held, that the Plaintiff was entitled to recover, and that the Defendant was not exonerated by an order of the committee not to pay. *Garner v. Shelley and Others*. Page 477

GROUND-RENT.

See LANDLORD AND TENANT, 2.

GUARANTY.

See ACTION ON THE CASE, 3.

Defendant guaranteed the payment of gold with which Plaintiff should supply a goldsmith for the purposes of his trade. Plaintiff discounted bills for the goldsmith, and gave him for them partly gold, and partly money: the gold was applied to the goldsmith's trade, but the goldsmith did not indorse the bills:

Held, that the Defendant was not liable under his guarantee for the gold so furnished. *Evans v. Whyle.* Page 485

INSURANCE.

1. In an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements, and must suffer if they are false, although he is unacquainted with the life insured, and the servant of the insurance-office undertakes to do all that is required by his office.

2. Plaintiff effecting an insurance on the life of *H.*, with whom

JOINT STOCK COMPANY.

he was unacquainted, desired the agent of the insurance-office to do all that was requisite. The agent knew *H.* well, and made the usual enquiries. One of the terms of the contract was, a reference to the usual medical attendant of the life insured.

H. having given a false reference: Held, that the Plaintiff could not recover. *Everett v. Desborough.* Page 503

JOINT STOCK COMPANY.

1. Debt on bond, conditioned for paying Plaintiff 10,000*l.*, upon his forming a company, and procuring purchasers for 9000 shares therein; such company to carry on a distillery according to a process for which a patent had been granted.

Plea, that the patent contained a proviso, rendering it void if transferred to more than five; that it was intended the said company should consist of more than five, and be formed for the purpose of enjoying the benefit of the letters-patent, of acting as a corporate body, and of dividing the benefit of the patent into 10,000 shares, transferable and assignable without charter from the king; and that it was corruptly and illegally agreed between the parties, that the Plaintiff should form the company for such purposes, and should sell the 9000 shares in order to raise a larger

a larger sum of money, under pretence of carrying on the privilege granted by the patent:

Held, a bar to the action. *Duvergier v. Fellows.* Page 248

2. The Defendants had purchased the scrip of a mining company originated in fraud, and attended one meeting of the company; but they never signed the partnership-deed, were innocent of the fraud, and transferred their scrip before the Plaintiff commenced an action for goods furnished to the company after Defendants had purchased their scrip:

Held, they were liable. *Ellis v. Schmœck and Another.* 521

JUDGMENT.

See PRACTICE, 1. 10.



LANDLORD AND TENANT.

See DISTRESS, 1, 2. ELEGIT, 2.

1. Plaintiff, who had entered on premises under an agreement for a lease, admitted a charge of half a year's rent in an account between him and his landlord:

Held, that this constituted him a tenant from year to year, and liable to distress. *Cox v. Bent and Others.* 185

2. 1. A payment of ground-rent by the occupier, in default of the mesne tenant, is not the less a compulsory payment, because the

ground-landlord on demanding it allows the occupier time to pay.

2. Growing rent may be discharged by such payments as well as rent actually due.

3. Where growing rent has been reduced by payments of land-tax, &c. if the landlord distrains for the whole sum reserved, the tenant may properly sue in case. *Carter v. Carter and Others.* Page 406

3. A landlord having treated an occupier of his land as a trespasser, by serving him with an ejectment, cannot afterwards distrain on him for rent, although the ejectment is directed against the claim of a third person, who comes in and defends in lieu of the occupier, and the occupier is aware of that circumstance, and is never turned out of possession. *Bridges v. Smith.* 410

LEASE.

He who lets, agrees to give possession, and if he fails to do so, the lessee may recover damages against him, and is not driven to bring an ejectment. *Coe v. Clay.* 440

LIBEL.

1. It is a libel to publish of a protestant archbishop, that he attempts to convert Catholic priests by offers of money and preferment. *Archbishop of Tuam v. Robeson and Another.* 17
2. In an action for a libel, it is no plea, that the Defendant had the libellous statement from another, and upon publication disclosed the

the author's name. *Sir W. De Crespigny v. Wellesley. Page 392*

LIEN.

A party, who, having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby, although the goods are sold to him under the execution, and are never removed off his premises.

Quere, Whether a trainer of race-horses has a lien on the horses for his services in training? *Jacobs, Assignee of Lawton, a Bankrupt, v. Latour and Messer.*

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LIMITATIONS.

1. Where money, which under a power in a will was directed to be raised by the sale of an estate, and to be invested by trustees with the consent by deed of the party interested, was invested partly in 1783, without any such consent by deed, and partly in 1806, by the person interested himself, the trustee having become *non compos*, and an act of parliament, reciting these investments, appointed a new trustee, Held, that neither the act nor the lapse of time cured the defective execution of the power, as against a writ of *formedon*.

2. The issue was, whether the money had been invested with the consent of the *cestui que* trust, according to the directions of this will: Held, that it was correct to direct the jury to consider,

MALICIOUS INJURIES' ACT.

whether it had been invested with the consent of the *cestui que* trust manifested by deed. *Cholmeley v. Paxton and Others. Page 48*

LONDON COURT OF CONSCIENCE ACT.

An officer of the sheriff of *Middlesex*, who resided and carried on his business in *Middlesex*, but who had also an office in *London*, Held, "to seek his livelihood in *London*," within the meaning of the *London court of conscience act. Bushnell and Others v. Levi.*

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MALICIOUS INJURIES' ACT, CONSTRUCTION OF.

Defendant, as fenreeve, having the care of certain lands, over which the Plaintiff was making a road, asked him by what authority he acted: the Plaintiff said, by authority of the magistrates, but did not exhibit any warrant; whereupon the Defendant apprehended and took him before a magistrate: Held, that Defendant was entitled to notice of action under 7 & 8 G. 4. c. 30., although the Plaintiff was not committing a malicious injury. *Wright v. Wales.*

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MEMORANDA.

Pages 298. 432.

MONEY

PAVING ACT.

MONEY HAD AND RECEIVED.

See BANKRUPT, 2. DISTRESS, 3. POWER.

MORTGAGE.

1. Where the mortgagor remains in possession, and the money is not repaid on the day stipulated, the mortgagee, who has a power of entry and sale on non-payment, may eject the mortgagor without notice to quit, or demand of possession. *Doe d. Fisher v. Giles and Others.* Page 421

2. 1. In taxing the costs upon a mortgage transaction, the mortgagee is not allowed the expence of a declaration of trust from him to a *cestui que* trust who lends the money.

2. The assignment of a mortgage must have an *ad valorem* stamp, if it be accompanied with any new security, or any additional sum be advanced. *Martin, Demandant; Baxter, Tenant; Grubb and Wife, Vouches.* 160

NOTICE TO QUIT.

See ELEGIT, 2. MORTGAGE, 1.

PAVING ACT.

The metropolis paving act, 57 G. 3. c. 29. s. 136. has repealed the *Clink* liberty paving act, 52 G. 3. c. 14. as to the time of commencing actions. *Burns v. Carter and Others.* 429

PLEADING.

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PAYMENT.

See BILL OF EXCHANGE.

PAYING INTO COURT.

See PRACTICE, 6. 11.

PLEADING.

See ASSUMPSIT, 1. BYE-LAW, 2. JOINT STOCK COMPANY, 1. LANDLORD AND TENANT, 2, 3. LIBEL, 2.

1. In an action against the assignees of a bankrupt, the Court refused to permit Defendants to plead *non est factum*, and that the premises did not come to them by assignment. *Whale v. Lenny and Others.* Page 12

2. If it appears on the whole that the condition of a bail-bond is to appear in the Common Pleas, it may be described as such in the declaration, although the expression on the bond is, "*to appear before our lord the King at Westminster,*" instead of, "*before the justices of our lord the King.*" *Crofts v. Stockley and Another.* 32

3. Variance. Evidence that according to the custom of the trade the Plaintiffs delivered coals to *N. H.* daily, and that at the end of every month he gave a bill, payable in two months:

Held, not sufficient to charge Defendant upon a guarantee for the payment of coals to be delivered to *N. H.* at a credit of two months from the delivery. *Holl and Another v. Hadley.* 54

4. Where

4. Where the Plaintiff's title to an advowson was traced in *quare impedit* through a period of two centuries, and the Defendant's claim arose on the alleged invalidity of a deed of 1672, the Court would not allow him to traverse all the allegations in the declaration, or to plead more pleas than were necessary to contest the deed of 1672. *Gully and Others v. The Bishop of Exeter and Dowling.* Page 42
5. In a declaration on a bail-bond, it is not necessary to aver that the writ on which Defendant was arrested was issued on an affidavit of debt, and indorsed with the sum sworn to. *Sharpe, Assignee of the Sheriff of Middlesex, v. Abbey and Others.* 193
6. 1. *Debt* lies against an executrix upon a cause of action accruing after the death of the testator.
2. Where an executrix referred to arbitration, to be finally determined on, certain disputes and differences respecting certain unsettled accounts, and the arbitrators, without finding assets, awarded her to pay a certain sum; Held, that *plenè administravit* was no bar to an action on the award. *Riddell v. Sutton, Executrix of Sutton.* 200
7. Declaration amended by allowing Plaintiff to declare, on the same cause of action, as surviving partners instead of administratrixes. *Taylor and Others, Administratrixes of Folder, v. Lyon.* 333
8. A plea false on the face of it may be treated as a nullity. *Vere and Others v. Carden.* 413

9. A defendant may plead matter *puis darrein continuance*, notwithstanding an order to rejoin issuably. *Bryant v. Sir J. Perring.* Page 414

POST-MARK.

See EVIDENCE, 7.

POWER.

Defendants entered into an agreement with C. to carry on for them certain mining speculations in *America*, furnished him with instructions, — a letter authorizing him to draw on them for 10,000*l.*, and a power of attorney of the most extensive description, "to take and work mines, to purchase tools and materials, and erect the necessary buildings, and to execute any deeds or instruments he might deem necessary for the purpose."

C., after he had raised 10,000*l.* under the letter of authority, obtained of Plaintiff in *America* 1500*l.*, which he applied to the Defendant's use, and for the amount drew bills on Defendants, which he indorsed to Plaintiff. He did not shew the letter of authority to the Plaintiff; there were no indorsements on it of sums previously raised, and it did not appear that the Plaintiff knew that any money had been raised before by C.; the Defendant refused to accept the bills:

Held, that the Plaintiff was entitled to recover 1500*l.* from Defendants, as money had and received to his use. *Withington v. Herring and Others.* 442

PRAC-

PRACTICE.

See PLEADING, 9.

1. Where a *cognovit* was given on the 8th of *February* in *Hilary* term, with a condition that judgment should not be entered, unless default should be made in payment on the ensuing 1st *April*, and the Defendant died in *Hilary* vacation, before the 1st of *April*, judgment entered up on the 10th *April* in *Hilary* vacation, after Defendant's death, was held regular, as relating to the first day of *Hilary* term, as also execution tested of a day in that term anterior to the Defendant's death. *Calvert v. Tomlin.* Page 1
2. The Court will not discharge a defendant from custody under a *ca. sa.* on the ground that he has been before irregularly taken and discharged under criminal process at the instance of the Plaintiff. *Mackie v. Warren.* 176
3. Where Defendant, after an application by Plaintiff's attorney, paid Plaintiff the debt demanded, without notice that a writ had been sued out, about which the Plaintiff said nothing, and the attorney afterwards arrested Defendant for the costs on a writ which had been sued out before the payment of the debt, the Court stayed the proceedings without costs. *Rooke v. Wasp.* 190
4. In moving to set aside an award made under a rule of Court, the rule *nisi* ought to be drawn up

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on reading the rule under which the matter was referred, and the objections to the award ought to be specified. *Christie v. Hamlet.*

Page 195

5. The Court discharged a rule for changing the *venue*, on an affidavit that the Defendant's attorney had said he should change the *venue* to postpone the trial, and (which was the fact) that in the interim an act would come into operation which would defeat the Plaintiff's claim. *Gaselee J. dissentiente. Amner and Another v. Cattell.* 208
6. Money paid into Court under 7 & 8 G. 4. c. 71. to abide the event of a cause, is not paid out under a rule absolute in the first instance. *Symes v. Rose.* 269
7. The Court discourages the practice of ordering *nihil* to be returned as a *scire facias*. *Beddington v. Beddington.* 284
8. Affidavit, that the Defendant had undertaken to be answerable to the creditors of *J. and W. M.* for the amount of the debts of such creditors, on their, the creditors, undertaking not to issue a commission of bankrupt against *J. and W. M.* before the 16th of *August*; that *J. and W. M.* owed Plaintiffs 1000*l.*; that neither Plaintiffs, nor, as they were informed and believed, any other of the creditors of *J. and W. M.* sued out a commission of bankrupt against *J. and W. M.* before the 16th of *August*; that neither *J. and W. M.* nor Defendant paid Plaintiffs the 1000*l.* due to them from *J. and W. M.*; and that

S s

Defend-

18 PROMISSORY NOTE.

Defendant owed Plaintiffs 1000*l.* upon his said undertaking;

Held, insufficient to hold Defendant to bail. *Elworthy and Others v. Maunder.* Page 295

9. Where a party to an arbitration under a rule of court revoked the arbitrators' authority upon discovering improper conduct, and then having sued for, and recovered by action, damages for the matter in dispute, went to reside in *Scotland*, the Court refused to stay execution upon the application of the adverse party, who proposed thereby to compel him to appear to an action on the arbitration-bond, the arbitrator having awarded against him, notwithstanding the revocation of authority. *Steward v. Williamson.*

415

10. Judgment signed in a writ of right, because a blank was left for the word *esplees* in the count, set aside. *Webb, Demandant; Lane, Tenant.*

285

11. Payment of money into court upon a general *indebitatus assumpsit* is no admission of a contract beyond the amount of the sum paid in. *Seaton v. Benedict.*

28

PROMISSORY NOTE.

See STAMP.

SCI. FA.

RECOVERY.

Where one of the vouchees became insane between the time of executing the warrant of attorney and the passing of the recovery, the Court refused to let it pass as to him, but permitted it as to the other parties. *Vale and Others, Vouchees.*

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REPLEVIN.

See LANDLORD AND TENANT, 3.

RESCOUS.

Plaintiff distrained Defendant's cattle damage-feasant, and went to apprise Defendant: during his absence the cattle escaped for half an hour into Defendant's ground, whence Plaintiff, on his return, drove them to his own yard: Defendant having taken them thence,

Held, no rescue. *Knowles v. Blake and Thomas.* Page 499

SHAM PLEA.

See PLEADING, 8.

SCHOOLMASTER.

See ASSUMPSIT, 2.

SCI. FA.

See PRACTICE, 7.

SEA-

SEA-WALLS.

See ACTION ON THE CASE.

SHIPPING.

It is no defence to an action by the owner of a ship for demurrage, that the owner has omitted to procure the necessary papers for the discharge of the cargo, if he omitted to do so at the request of the Defendant. *Furnell v. Thomas.* Page 188

STAMP.

See MORTGAGE, 2. 2.

A note for 100*l.*, payable to *A. B.* or order on demand, is subject only to a stamp of 3*s.* 6*d.* *Armitage v. Berry and Another.* 501

STAYING PROCEEDINGS.

See PRACTICE, 3. 9.

TITHES.

Where commissioners under an inclosure act of 1769 were to make allotments to persons possessing interests in the contiguous townships *A.*, *B.*, and *C.*, and made allotments to a rector in *B.* and *C.* in respect of tithes and glebe to which he was entitled in *B.* and *C.*, and in *A.* in respect of glebe to which he was entitled in *A.*, but omitted to make any

specific allotment in *A.* in respect of tithes to which he was entitled in *A.*; the act containing a saving clause for all persons other than those to whom allotments or compensations should be made in respect of their several interests, Held, that the rector was not barred from suing for his tithes in *A.* in 1825, although the award was to be final unless appealed against in six months. *Thorpe v. Cooper.* Page 116

TOLL.

1. Keeping up a capstern and rope in a cove to assist boats in landing, and without which they could not safely land in bad weather, Held, a good consideration for a reasonable toll on all boats frequenting the Cove, whether they used the capstern or not; and the custom to exact the toll, held good, although the party claiming it was neither owner of the Cove nor lord of the manor, nor were his predecessors shewn to have been such; but he and they had always been owners of the spot on which the capstern stood, and of an estate in the neighbourhood.

2. Held, that a fisherman frequenting the Cove was not a competent witness for a party resisting the toll. *Lord Falmouth v. George.* Page 286

TRESPASS.

See COSTS, 2. MALICIOUS INJURIES' ACT.

1. The Plaintiff, who had built a chapel, conveyed it to Defendant by

by a deed, the validity of which was questionable. Defendant took possession, and gave the key to a gardener, who, with his permission, lent it to the Plaintiff to preach in the chapel. The Plaintiff thereupon locked the chapel, and refused to re-deliver the key: Held, that he had not sufficient possession to maintain trespass. *Revett v. Brown.* 7

2. 1. Defendant, a constable, being told by *A.* that Plaintiff had robbed her, and the information being countenanced by a supposed intercepted letter which was shewn to him, apprehended Plaintiff, a respectable inhabitant of *Cheltenham*, at her lodgings, and took her from her bed at night to prison.

The charge proving unfounded, Plaintiff sued him for the false imprisonment; and the Judge having directed the jury to consider whether the foregoing circumstances afforded the Defendant reasonable ground to suppose the Plaintiff had committed a felony; and whether, in his situation, they would have acted as he had done, Held, that this direction was substantially correct.

2. Held also, that, under the circumstances, the degree of coercion resorted to by the Defendant was not excessive. *Davies v. Russell and Others.* Page 354

TROVER.

See BANKRUPT, 5. ACTION ON THE CASE, 2.

VARIANCE.

See PLEADING, 2, 3. ASSUMPSIT, 1.

VENUE.

See PRACTICE, 5.

VEXATIOUS ARREST.

See COSTS.

WRIT OF RIGHT.

See AMENDMENT.

END OF VOL. V.

